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In The

Supreme Court of The United States

CONEY ISLAND RESORTS, INC.,

Petitioner,

- against -

RUDOLPH GIULIANI, individually and as Mayor of the City of New York and THE CITY OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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11 pp

QUESTIONS PRESENTED

Minority developer, Coney Island Resorts, Inc. ("CIR"), raises several constitutional claims concerning the City of New York's termination of CIR's $400 million redevelopment project. The City's summary judgment motion turned upon whether, under New York State law, CIR and the City entered into a binding contract for the lease of City property, thereby affording to CIR a constitutionally protectable property interest. State law provides the rule of decision on this issue. However, transgressing fundamental principles of federalism, the Court of Appeals, affirming the District Court, disregarded New York's law of contractual interpretation and the associated state law burden of proof by summarily reinterpreting the parties' clear and unambiguous contract, thereby judicially reinstating a financing pre-condition previously removed by the parties, thus invalidating the contract. The questions presented are:

1. Does the *Erie R.R. Co. v. Tompkins* doctrine, a mainstay of federalism mandating that state substantive law provide the rule of decision in federal court diversity actions, also apply in non-diversity cases to issues arising under state law?

2. Does the *Erie* doctrine mandate application of state law rules of contract interpretation and the associated state law burden of proof to a contract issue arising under state law?

3. Does the state's common law rule, depriving its courts of the power to judicially add contract conditions by "interpretation" or "construction", also apply to a federal court determining a state law contract issue?

4. Does the grant of summary judgment upon woefully insufficient evidence deprive CIR of its jury trial right and overlook its non-contractual equal protection claim?

LIST OF ALL PARTIES

All parties are named in the caption.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, CONEY ISLAND RESORTS, INC., a Delaware Corporation, is not a publicly-held corporation or other publicly-held entity, nor are its "Affiliates" described below.

Petitioner, CONEY ISLAND RESORTS, INC. does not have any parent corporation, nor do its "Affiliates" described below.

No publicly-held company or companies own any shares of the stock of petitioner, CONEY ISLAND RESORTS, INC. nor of its "Affiliates" described below.

Petitioner, CONEY ISLAND RESORTS, INC. has privately held "Affiliates": WANTANABE REALTY CORP., a New York Corporation, and CONEY ISLAND AMUSEMENTS, INC. (formerly CONEY ISLAND RESORTS, INC.), a New York corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The District Court Memorandum and Order granting summary judgment to defendants, dated July 13, 2000 (Glasser, D.J.) (Petitioner's Appendix "App." 10a-31a) officially reported as *Coney Island Resorts, Inc. v. Giuliani*, 103 F.Supp. 2d 645 (E.D.N.Y. 2000). The District Court judgment entered thereupon (App. 32a) dated July 17, 2000 is not officially published. The Second Circuit Court of Appeals Summary Order dated April 18, 2001 (Calabresi, C.J., Pooler, C.J. and Sack, C.J.) (App. 3a-9a), affirming the District Court is not officially published. The Court of Appeals Order denying a rehearing and denying a rehearing en banc, date May 30, 2001, (per curium) (App. 1a-2a) is not officially published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Summary Order on April 18, 2001 and denied a rehearing and a rehearing en banc on May 30, 2001 (App. 1a-2a). This petition shall be filed/mailed within 90 days of the denial of a rehearing. Petitioner respectfully invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (See 28 U.S.C. § 2101(c), S. Ct. Rule 13.3).

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652:

> "Section 1652. State Laws as Rules of Decision.
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The pertinent contractual provisions are reproduced at App. 48a-49a and are discussed and quoted in the Statement of the Case below.

STATEMENT OF THE CASE

In this action, petitioner-plaintiff Coney Island Resorts, Inc. ("CIR"), a minority owned developer, seeks to enforce and to preserve its constitutionally protected property interest in a contract with respondent-defendant the City of New York to enter a 99 year Ground Lease for property (a sizeable assemblage of CIR property and City property) upon which CIR was to construct a $400 million redevelopment project consisting of a family-oriented theme park and amusement center in the economically depressed Coney Island area of Brooklyn. The property acquired by CIR was to be combined with property owned by the City, the combined assemblage to be titled in the City and simultaneously leased back to CIR by means of a 99 year Ground Lease. After a $12 million expenditure by CIR, an extensive environmental review and the passage of necessary state enabling legislation, in 1994 the City administration changed and CIR's contract to enter the Ground Lease, which had been fully performed on its part by CIR, was repudiated by the office of the new

mayor, respondent-defendant Mayor Giuliani, who expressed a preference for a minor league stadium on a part of the Ground Lease property that was to be contributed to the assemblage by the City. The new administration could not be dissuaded from its course notwithstanding Donaldson, Lufkin & Jenrette, a respected real estate firm, expressing its optimism that project financing in the sum of $450 million would likely be available in approximately 120 days. (App. 54a).

CIR's initial state litigation, a 1994 "Article 78 Proceeding" challenging mayoral authority to declare the project "terminated", remained dormant[1] while a protracted course of negotiations between CIR and the City's Economic Development Corporation ("EDC") was pursued in an effort by CIR to accommodate both the stadium and the project. As an inducement to encourage the City to honor its agreement, CIR presented a succession of highly respected proposed strategic partners for the project, including PLC Commercial recommended by J.P. Morgan Real Estate, Forest City Ratner, New Roc Associates and Tishman Speyer. Ultimately, the new mayor's office removed the project from the EDC's jurisdiction and demanded, under threat of the loss of its other City projects, that one of those strategic partners (Forest City Ratner) abandon its partnership. In February 2000, it became apparent to CIR that the City administration was intent upon constructing the stadium in place of, rather

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[1] Though CIR was denied preliminary injunctive relief, the Article 78 Proceeding was never determined and therefore remains pending. The District Court opined that, under New York law, CIR's commencement of that proceeding was defective. However, the Court of Appeals characterized that statement as *dicta*, and therefore did not address that issue on appeal. (See App. 7a at n. 3).

than in conjunction with CIR's project. Therefore, CIR commenced a specific performance action in state court seeking to enforce its contract to enter the Ground Lease. During the pendency of that suit, the City Council legislatively authorized a stadium lease and the City entered the City portion of the Ground Lease property with bulldozers, commencing construction of the stadium.

In April 2000, CIR, claiming a constitutionally protected interest in the Ground Lease property, commenced this action against the City and the new mayor, pursuant to 42 U.S.C. § 1983, *inter alia,* seeking injunctive relief enforcing its contract with the City to enter the Ground Lease and asserting the following constitutional claims: The City's legislative and physical seizure of a portion of the Ground Lease property and commencement of construction of a stadium thereupon, destroyed CIR's project, devalued the remainder of CIR's property, and violated CIR's substantive due process rights (XIV Amendment), was an unlawful "seizure" in violation of Fourth Amendment rights, was an uncompensated "taking" in violation of Fifth Amendment rights, and impaired CIR's municipal contract in violation of the "Contract Clause". Further, the mayor's unprecedented action, in removing CIR's project from the City's normal development channels with the EDC and coercing a strategic partner of CIR to abandon its role in the project, particularly as CIR's principal is a minority contractor, violated CIR's equal protection rights (XIV Amendment).[2]

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[2] The "takings" and "contract clause" claims, not found in the complaint, were treated by the District Court as having been asserted for purposes of the summary judgment motion, as plaintiff stated its intention to add those claims in an amended complaint. (App. 27a-29a; See App. 29a at n.8).

CIR's contract to enter the Ground Lease takes the form of a July 27, 1992 extension agreement, signed by CIR and the City and approved by the City's Corporation Counsel, specifying the date for the signing of the Ground Lease and the payment to be made by CIR at the signing (App. 48a-49a), together with the final draft of the Ground Lease, a detailed 269 page document which the City, in two separate writings also approved by Corporation Counsel, and in two affidavits, confirmed was fully agreed upon by the parties and contained all the material terms of the transaction[3], in

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[3] In two earlier extension agreements between the City and CIR, both approved as to form by Corporation Counsel, the City twice unequivocally confirmed that the final draft Ground Lease presented by the City to CIR was complete in all material respects:

> "This letter confirms that the undersigned have concluded negotiating in material respects a ground lease between The City of New York (sometimes hereinafter referred to as the 'City'), as Landlord, and Coney Island Resorts, Inc. ('CIR'), as Tenant, for the project known as the Steeplechase Amusement Park." (App. 36a) (The second letter agreement's nearly identical language is found at App. 40a).

In an April 6, 1994 affidavit presented in the state Article 78 Proceeding, Angela Brown, then Vice President for Development, Borough of Brooklyn, of the EDC made the following admission:

> "24. Having received the necessary approvals for the disposition of the City-owned parklands, I am informed that by November of 1990, representatives of the parties had substantially negotiated a ground lease in all material respects in

conformity with the City's extensive Board of Estimate enabling resolution, itself a 24 page long document which also specified in detail the Ground Lease's terms.

At issue upon defendants' summary judgment motion before the District Court, and at issue on appeal before the Court of Appeals, was whether the contract to enter the Ground Lease, i.e., the operative July 27, 1992 final extension agreement, contained a condition precedent requiring a firm commitment for project financing before Ground Lease execution. It is undisputed that CIR timely executed and delivered the Ground Lease, together with the requisite payment, in precise and full compliance with the express terms of that operative extension agreement.

> conformity with the Board of Estimate authorizing resolution. The material terms of the ground lease were embodied in a draft lease dated November 15, 1990. (App. 59a at ¶ 24).

In an April 22, 2000 affidavit submitted in this action, Robert W. Balder, current Senior Vice President for Real Estate of the EDC, made the same admission:

> "Representatives of the parties negotiated the material terms of a ground lease, which were embodied into a draft Consolidated and Restated Lease dated November 15, 1990 . . . ." (App. 62a at ¶ 12).

Thus, neither the District Court nor the Court of Appeals gave any consideration to the City's belated and disingenuous contention that the November 15, 1990 draft lease was materially incomplete because it bears the legend "Draft 11/15/90" and some minor details were left open to be adjusted to suit the project's lending institution.

Therefore, unless a pre-leasing financing condition existed, admittedly unfulfilled if it did exist, then CIR's contract to enter the Ground Lease would be firm and CIR's constitutionally protected interest in the Ground Lease property would be unassailable.

The transaction as originally structured by the detailed New York City Board of Estimate enabling resolution, and as set forth in the final draft Ground Lease negotiated by the parties, made financing a post-leasing, pre-construction requirement rather than a condition to the entering of the Ground Lease itself. (App. 33a-35a; See App. 34a-35a at § 13.04(d)(ii)).

Initially, CIR had its project financing in place with the London based Theme Park Division of Security Pacific Bank, a renown lender to major amusement parks. Unfortunately, an economic downturn and banking crisis in mid-1989 led to that bank division's demise, with no replacement funding source then available. (App. 64a-67a). CIR desired to defer the execution of the Ground Lease, as lease execution would start the running of the pre-construction period, and it was far from certain that the economic situation would sufficiently improve for financing to be in place upon the specified construction commencement date as required by the Ground Lease.

Therefore, in exchange for a fee paid by CIR in each instance, CIR and the City entered into five consecutive letter agreements extending the Ground Lease execution date. The first and second extension agreements, varying the original terms of the transaction, indeed made financing a condition of Ground Lease execution. (App. 36a, 40a). However, the last three extension agreements (App. 44a-49a), including the operative fifth extension agreement dated July 27, 1992 (App.

48a-49a), did not contain a financing pre-condition to lease execution, resulting in financing reverting to its former status as a pre-construction condition, per the provisions of the draft Ground Lease.

The July 27, 1992 final extension agreement contained but two conditions: a) That CIR execute and deliver the Ground lease by September 25, 1992; and b) That CIR pay $20,000 to the EDC by September 25, 1992:

> "Pursuant to your request, the City of New York hereby extends the time for execution and delivery of the Ground Lease specified in the Board of Estimate Resolution approved on May 23, 1989 (cal No. 21), to September 25, 1992. As condition to this extension, Coney Island Resorts ('CIR') shall make a payment to the Economic Development Corporation ('EDC'), on behalf of the City, the amount of $20,000, due by September 25, 1992.
>
> Except as may otherwise be provided in the License Agreement between the Department of Parks and Recreation ('DPR') and CIR, dated May 1, 1985, ***in the event either CIR has failed to make the required payment by September 25, 1992 or has not executed or delivered the Ground Lease by September 25, 1992, CIR shall have no authority, right, designation or interest of any kind with respect to the City-owned Project Parcels.***" (App. 48a) (emphasis added).

It is undisputed that, within the time period prescribed by the final extension agreement, CIR executed the Ground

Lease and delivered it to the City together with the required payment.[4] It is likewise undisputed that the City deposited and retained the payment and retained the Ground Lease signed by CIR, but did not return an executed copy of the Ground Lease to CIR.

CIR contends that the financing condition to lease execution was intentionally dropped from the last three extensions, as the City and CIR agreed that only a long-term lease, fully executed by the parties and in the hands of CIR, would be financeable. (App. 67a-68). EDC Vice President Angela Brown, in her 1994 affidavit, conceded that CIR indeed required a lease in hand to obtain firm financing. (App. 58a at ¶ 11).

The central thesis of respondents-defendants' argument, and the lynchpin of the District Court's grant of summary judgment to defendants and of the Court of Appeals' affirmance of that grant, is the City's contention that, at the time CIR executed and delivered the Ground Lease to the City there remained extant a financing precondition to lease execution. The City, however, was unable to cite to any provision of any document extant on that date containing a financing precondition, nor did the City aver to any oral agreement between the parties to that effect. Instead, the City relied exclusively upon a self-serving hearsay statement made by EDC Vice-President Brown in her 1994 affidavit, claiming that she was "informed by counsel" that such financing

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[4] Under cover letter dated September 24, 1992, CIR delivered to the EDC the Ground Lease signed by CIR accompanied by a $20,000 check. Steven Fuld, of the EDC, gave his handwritten receipt for the items on September 25, 1992. CIR's $20,000 check was then deposited by the EDC. (App. 50a-53a).

precondition continued to exist. (See App. 59a-60a at ¶ 37). Ultimately, on oral argument before the Court of Appeals, the City, for the first time, contended that the omission of the financing condition from the last three extension agreements was a result of poor draftsmanship by, and a unilateral mistake by Corporation Counsel.

Pre-joinder of issue, CIR moved in the District Court for a preliminary injunction and the City cross-moved to dismiss. The District Court denied CIR's motion, converted the City's cross-motion to a motion for summary judgment pursuant Fed.R.Civ.P. Rule 56, and, prior to any disclosure being had, granted summary judgment to the City dismissing the complaint. The District Court predicated its grant of summary judgment upon its reinterpretation of the final extension agreement "in the light of all their surrounding circumstances" (App. 25a), deeming it to contain an implied financing pre-condition to lease execution (App. 25a-27a). As that implied financing pre-condition was not met, the District Court summarily invalidated the contract to enter the Ground Lease, leaving CIR without a sufficient "property interest" upon which to found its constitutional claims.[5] The Court of

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[5] The Summary Order declined to address the *dicta* of the District Court, suggesting that, even if the contract were valid, CIR's contract claims would not rise to the level of constitutional violations. (See App. 7a at n. 3). The District Court relied upon cases (cited at App. 27a at n. 7) holding that mere non-payment of monies due under municipal contracts will not rise to the level of a constitutional claim nor will claims by a disappointed proposed developer whose expectancy never ripened into a contractual right. In contradistinction, in the instant action CIR relies upon a physical and legislative invasion of its established contractual interest in a long-term lease of real property for development purposes, which indeed is a constitutionally protected "property interest". See

Appeals, in its Summary Order, affirmed, holding that, simply because the final extension agreement lacked an integration clause it was, *ipso facto*, a "partial" agreement. Therefore, parol evidence permitted the "partial agreement to be interpreted against the backdrop of a long-term, ongoing negotiation and contractual relationship . . . [and] no rational juror could conclude anything other than that the City and CIR intended, in the final extension agreement, to maintain the financing condition." (App. 8a).

Subject matter jurisdiction exists in the court of first instance (District Court) pursuant to 28 U.S.C. §§ 1331, 1343, & 1367 (See 42 U.S.C. §§ 1983 & 1988).

REASONS FOR GRANTING THE WRIT

Respectfully, the petition should be granted for the following reasons:

First: The Second Circuit Court of Appeals' Summary Order, though articulating, *pro forma*, the rubric for awarding summary judgment, has, by disregarding the state law rules of contractual interpretation and the inextricably related state law

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Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118 (3rd Cir. 2000) (municipality's arbitrary withholding of approval of development plan after all objective requirements for plan were met); *Deblasio v. Zoning Board of Adjustment*, 53 F.3d 592, 601 n.10 (3rd Cir. 1995), *cert. denied*, 516 U.S. 937 (1995) (a lease is a constitutionally protectable property interest). However, even if the District Court were correct in opining that CIR's constitutional claims were insufficient, to allow the erroneous holding, that CIR's contract is invalid, to stand would have a devastating effect upon CIR's maintenance of its state specific performance action, which would be precluded upon res judicata-collateral estoppel grounds.

burdens of proof, impermissibly imposed an amorphous federal common law of contractual interpretation upon a $400 million redevelopment contract governed entirely by the law of the State of New York. New York is the unrivaled center of national and international commercial and financial transactions. Millions of contracts are entered in New York or are otherwise governed by New York's laws, and spawn considerable litigation in the courts of the Second Circuit. The Summary Order, if followed, would deprive those contracts of the uniform standards of interpretation that they have heretofore enjoyed under New York's exceptionally well-developed law of contracts, and subject them instead to the vagaries of the unfettered interpretational discretion of the particular federal judge or panel hearing the particular case. The ensuing uncertainty of interpretation will cause irreparable harm to countless contracting parties and negatively impact upon New York's standing as the premier commercial and financial hub. Respectfully, review by this Court should be granted to restore the primacy of the *Erie* doctrine and its principles of federalism to issues of contractual interpretation in cases before the Second Circuit in which state law provides the rule of decision.

Second: The Court of Appeals's Summary Order has, under the guise of "interpretation", rewritten a clear and unambiguous contract, redrafting that contract to include a financing condition precedent not present in the text. In so deciding, the Court of Appeals places itself in direct conflict with the decisions of the courts of the state of New York, including that state's highest court, and in conflict with the Second Circuit's own prior decisions, all holding that such judicial rewriting of contracts is impermissible. Respectfully, review should be granted to resolve this conflict.

Third: The Court of Appeals founded its holding upon

the absence of an integration clause, thereby, in its incorrect interpretation of state law, permitting the introduction of parol evidence to supplement the contract. Applying its view of the parol evidence (the "ongoing relationship" of the parties), the Court of Appeals engrafted the pivotal but otherwise absent financing condition precedent upon the parties' unambiguous contract. However, even if parol evidence were receivable, allowing the admissibility of parol evidence does not render such evidence sufficient to support an award of summary judgment, particularly in the instant case where that evidence is sparse, hotly contested and equivocal. As summary judgment in a contract case is rarely if ever supportable by resort to parol evidence, and as summary judgment in the instant case is singularly inappropriate upon the state of the record, respectfully, review should be granted to preserve to plaintiff its constitutional right to a trial by jury.

I. The Decision of the Court of Appeals Impermissibly Engrafts an Amorphous Federal Common Law of Contractual Interpretation upon Contracts Governed by State Law, Undermining the *Erie* Doctrine and Contravening New York's Well-developed Body of Contract Law

A. The *Erie* Doctrine is Applicable to State Law Property Right Issues in Non-diversity Cases

Inasmuch as the Federal Constitution protects rather than creates property interests, the existence of a constitutionally protectable property interest is determined by reference to an independent source such as state law. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

It is undisputed that, in the instant action, CIR's rights

under its contract with the City arise under New York State's law of contracts.

When a claim or issue is predicated upon state rather than federal law, federal courts must apply the substantive common law of the state, and are without power to declare their own substantive common law upon that claim or issue. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). See the Rules of Decision Act, 28 U.S.C. § 1652.

Though cited principally in the context of diversity cases, the *Erie* doctrine is not so limited, and is applicable to those issues and claims in non-diversity cases whose source is found in state rather than federal law. See *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 165 at n. 2 (1987) (Scalia, J. concurring)(" ' 'the [[Rules of Decision] Act] itself neither contains nor suggests ... a distinction' ' between diversity and federal-question cases . . . the view that *Erie* requires application of state law only in diversity cases [is] an 'oft-encountered heresy'"(citations omitted)); *A.I. Trade Finance, Inc. v. Petra Intern. Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995). In such cases, with respect to state law based issues, a federal court's power to substitute a federal rule of decision for state law is "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994) (citation omitted). See *Woodward Governor Co. v. Curtiss Wright Flight Systems, Inc.*, 164 F.3d 123, 126-27 (2nd Cir. 1999).

Thus, the *Erie* doctrine mandates that New York State's substantive law of contracts provide the rule of decision in determining the efficacy of CIR's contract with the City to enter the Ground Lease.

B. A Contract to Enter a Lease is Binding and Enforceable in New York

Under New York law, a written contract to enter a lease is binding and enforceable, provided that an agreement upon the material terms of the tenancy has been reached. *1130 President St. Corp. v. Bolton Realty Corp.*, 300 N.Y. 63, 89 N.E.2d 16 (NY 1949); *Newburger v. American Surety Company*, 242 N.Y. 134, 151 N.E. 155 (NY 1926); *Kalker v. Columbus Properties, Inc.*, 111 A.D.2d 117, 489 N.Y.S.2d 495 (NYAD 1st Dep't 1985); *Taussig v. Pines Enterprises, Inc.*, 56 A.D.2d 548, 391 N.Y.S.2d 860 (NYAD 1st Dep't 1977); *Di Michele v. Jersey Pork Stores, Inc.*, 233 A.D. 876, 251 N.Y.S. 817 (NYAD 2nd Dep't 1931). New York's Statute of Frauds expressly recognizes the validity of a contract to enter into a lease. NY Gen Oblig. L § 5-703(2). The refusal of one of the parties to sign and deliver the lease form does not affect the enforceability of the agreement. *Newburger v. American Surety Company*, *supra*; *Goldman v. Orange Co. Chptr., NY State Assoc. for Retarded Children, Inc.*, 121 A.D.2d 683, 503 N.Y.S.2d 884 (NYAD 2nd Dep't 1986); *Di Michele v. Jersey Pork Stores, Inc.*, *supra*.

Both the District Court and the Court of Appeals unhesitatingly recognized that CIR validly contracted with the City to enter the Ground Lease, as the voluminous draft Ground Lease referenced by the parties' agreement contained the material leasing terms. The sole issue of import considered by the Court of Appeals, was whether that contract contained an unsatisfied implied-in-fact pre-leasing financing contingency.

C. Substantive New York Contract Law Imposes a Heavy Burden of Proof to Establish an Implied-in-Fact Covenant, But *Erie* Doctrine Recognition of that Burden is Now Imperiled in the Second Circuit

New York State contract law imposes "a heavy burden" of proof to establish an implied-in-fact covenant, "for it is not the function of the courts to remake the contract agreed to by the parties, but rather to enforce it as it exists." *Rowe v. Great Atlantic & Pacific Tea Company, Inc.*, 46 N.Y.2d 62, 69, 385 N.E.2d 566, 570 (NY 1978). See *Carroll v. Miller*, 166 A.D.2d 492, 493, 561 N.Y.S.2d 47, 48 (NYAD 2nd Dep't 1990). Moreover, under New York law, if a party, by construction, seeks to add a provision to an unambiguous contract, that party bears the burden to "show that [movant's] construction is the only one that flows naturally from the words used". *Stone Travel Agency, Inc. v. Lambrou,* 176 A.D.2d 1170, 1171, 575 N.Y.S.2d 609, 611 (NYAD 3rd Dep't 1991). See *Gross, Shuman, Brizdle & Gilfillan, P. C. v. Bayger*, 256 A.D.2d 1187, 1188, 682 N.Y.S.2d 766, 767 (NYAD 4th Dep't 1998).

The state law burden of proof is substantive not procedural. *American Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994). See *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20-21 (2000); *Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 271 (1994). New York state law is in accord. "[W]here the rule as to burden of proof is such that it is inseparably connected with the substantive rights of the parties, the statute [specifying the burden of proof] should be considered as affecting substantive rights. . . ." *Reardon v. Joffe*, 25 A.D.2d 370, 372, 269 N.Y.S.2d 635, 637 (NYAD 1st Dep't 1966).

Therefore, pursuant to the *Erie* doctrine, the foregoing state law burdens of proof are applicable to the City's claim of the existence of an implied-in-fact pre-leasing financing condition.

Unfortunately, Second Circuit cases on point are conflicted, resulting in the failure of the appellate panel in this case to recognize or even discuss the state law burden of proof, notwithstanding burden of proof being squarely briefed. The leading Second Circuit authority, *Woodling v. Garrett Corp.*, 813 F.2d 543, 552 (2nd Cir. 1987) (applying Connecticut substantive law but the New York burden of proof) declares that, in contract interpretation actions, under New York choice of law principals, the burden proof is procedural and the law of the forum applies. *Woodling v. Garrett Corp.* continues to be cited as authoritative in the Second Circuit. See, e.g., *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1205 (2nd Cir. 1995); *Cronin v. Family Educ. Co.*, 105 F. Supp.2d 136, 139 (E.D.N.Y. 2000). Yet, other rulings in that circuit, concerning the interpretation of contracts, routinely apply state law on the burden of proof when applying substantive state contract law. E.g., *Commercial Union Assur. Co. v. Oak Park Marina, Inc.*, 198 F.3d 55, 60-61 (2nd Cir. 1999).

Assuredly, the Court of Appeals in this action did not apply, or even consider the astonishingly high state law burden of proof necessary to impose an implied-in-fact unwritten condition upon an unambiguous written contract, thus, *de facto,* continuing the erroneous holding of *Woodling v. Garrett Corp.* and placing the *Erie* doctrine in jeopardy in Second Circuit state law contract cases.

D. Substantive New York Contract Law Severely Restricts the Use of Parol Evidence to Modify an Unambiguous Contract, a Restriction Disregarded by the Court of Appeals

The parol evidence rule is an important rule of substantive law in the state of New York. 58 N.Y. Jur. 2d Evidence and Witnesses § 565. The rule is therefore encompassed within the *Erie* doctrine. E.g., *Bourbon v. Kmart Corp.*, 223 F.3d 469, 475 (7th Cir. 2000); *Electrical Distributors, Inc. v. SFR, Inc.*, 166 F.3d 1074, 1082 (10th Cir. 1999); *Centronics Financial Corp. v. El Conquistador Hotel Corp.*, 573 F.2d 779, 782 (2nd Cir. 1978).

New York's law of contracts takes a restrictive view of the attempted use of parol evidence to modify an unambiguous written contract. "Generally, written contracts may not be modified by oral assertions where the writing is unambiguous on its face." *Luftig v. Luftig*, 239 A.D.2d 225, 227, 657 N.Y.S.2d 658, 659 (NYAD 1st Dep't 1997) (agreement did contain integration clause, but broad holding not dependant upon it). See *O'Connor v. O'Connor*, 228 A.D.2d 156, 159, 644 N.Y.S.2d 174, 175 (NYAD 1st Dep't 1996) (agreement also contained integration clause, but broad holding not dependant upon it). See *Grossberg v. Grossberg*, 104 A.D.2d 439, 440, 478 N.Y.S.2d 959, 960 (NYAD 2nd Dep't 1984).

Absent an ambiguity, New York contract law may nevertheless permit parol evidence to supplement a partially integrated document, but only under limited and rigidly defined circumstances: "Two requirements must be met for a case to come within the exception to the parol evidence rule. . .. It must clearly appear that the writing on its face is not

complete. In addition, the parol evidence offered must clearly appear to be consistent with, and not contradictory of, the written instrument." 58 N.Y. Jur. 2d Evidence and Witnesses § 610 (footnotes omitted). Thus, contrary to the implication of the Summary Order, under New York State law, the absence of an integration clause does not, *ipso facto,* authorize resort to parol evidence. Both prongs of the above-stated two pronged test must nonetheless be satisfied.

Neither the District Court nor the Court of Appeals, or for that matter, the City, contend that any ambiguity or incompleteness appears on the face of the written contract justifying a resort to parol evidence. Indeed, the two conditions expressed in the written contract, to be fulfilled by CIR, couldn't be more complete or clear: deliver the signed lease and deliver the required payment by the specified date. Thus, CIR's written contract is complete on it face, negating the first of the two state law requirements for admission of parol evidence.

The District Court and Court of Appeals decisions recognize that the July 27, 1992 final extension agreement does not contain an express financing contingency to lease execution, and in fact, that none of the final three extension agreements contain such contingency. Therefore, implying such contingency is contradictory of and not consistent with the parties' written contract, thus negating the second state law requirement for the admission of parol evidence.

However, undeterred by state law, both the District Court and the Court of Appeals held that a financing pre-condition to lease execution should be implied based upon parol-extrinsic evidence consisting of the "surrounding circumstances" of the parties' past dealings, and both courts did, in fact, imply such a condition.

In its only, and brief nod to state law, the Summary Order of the Court of Appeals discusses New York's parol evidence rule in the most general terms (App. 8a), but fails to perform the two-pronged analysis mandated by state law for an exemption from that rule, and instead, by *ipse dixit*, simply declares that the rule permits parol evidence in this instance.

Thus, in yet another way, by resorting to parol evidence when state law does not permit its use, the Court of Appeals, contrary to the *Erie* doctrine, disregards New York State's law of contracts.

E. Even Solid Parol Evidence Cannot Support Summary Judgment, and in this Case, the Parol Evidence Was Strikingly Insufficient

As demonstrated above, under New York's version of the parol evidence rule, extrinsic evidence is not admissible in this case. However, assuming solely for the sake of argument that parol evidence was properly admissible, that assumption does not end the inquiry. To severely alter the express written terms of a contract by adding an implied-in-fact condition that voids that contract, "evidence" is required of sufficient quality to meet the foregoing "heavy" state law burden of proof, a burden which, upon a summary judgment motion, is increased by an order of magnitude. Further, that "evidence" must establish that the condition to be added, though absent from the writing, was indeed agreed to by the parties. A showing that the contract, as altered by parol, would more logically suit one of the party's needs or business goals, is obviously inadequate.

Unfortunately, the Court of Appeals, after declaring that parol evidence was admissible, failed to consider whether the requisite quantum of parol "evidence", indeed whether any

probative parol "evidence" at all, was provided by the City.

In truth, when the parol "evidence" in this case is examined under state law standards, it is apparent that the City has presented no "evidence" at all. The City presented no witness alleging that CIR agreed to the imposition of the additional unwritten condition in the final extension. All that the City submitted was a 1994 affidavit from prior state court litigation, in which an official of the EDC claims that she was "informed by counsel" that such financing precondition continued to exist, surely just a non-probative, hearsay rendition of the musings of the City's litigation counsel.

The Court of Appeals, affirming the District Court, opines that a financing pre-condition can nevertheless be divined through "interpret[ation] against the backdrop of a long-term, ongoing negotiation and contractual relationship." (App. 8a). However, no evidence was presented to demonstrate that, during such negotiations, CIR assented to the parol continuation of the financing pre-condition after that condition was omitted from the three most recent writings. Moreover, the transactional history is as supportive of CIR's contentions as it is of the City's. The transaction, as originally structured, made financing a pre-condition to commencement of construction, not to the entering of the Ground Lease. The structuring of the agreement in this fashion would allow CIR to execute the Ground Lease, develop a construction plan, obtain City approval of that plan, and then approach its lending institution for construction financing, with a signed lease and an approved construction plan in hand. When the banking crises compelled CIR to seek extensions, the City, in the first two of the five extensions, imposed a financing pre-condition to entering the Ground Lease. However, as demonstrated above, even the City concedes that, without a long-term lease in hand, the project

was not financeable. Isn't it, therefore, as logical to assume that the parties' omission of the condition from the last three extensions, each of which were dutifully reviewed by and approved as to form by the City's corporation counsel, was an expression by the parties that the transaction as originally structured in the Ground Lease, with financing as a pre-construction condition, made eminent sense and was worth returning to? Moreover, for the Court of Appeals to state that "no rational juror" could find the pre-leasing financing condition to be absent, is to insupportably rule that CIR and the City, after imposing such condition upon their first two extension agreements, lacked the power to remove the condition from their last three extension agreements, which is what, in fact, at least in writing, those parties clearly and unambiguously did.

The City's claim, raised for the first time on oral argument of the appeal and unproved in the record, of a unilateral mistake caused by the carelessness of Corporation Counsel in drafting the last three extension agreements, is unavailing to reform the contract under New York law. See 22 N.Y. Jur. 2d Contracts § 126. Thus, that new argument is also unsupportive of the City's contention.

Further, the purported need to resort to extrinsic evidence to interpret the contract, in and of itself precludes the granting of summary judgment, as, once the court determines as a matter of law that parol evidence is required, it remains for the trier of fact to determine the parties' intent from that evidence. See *Scholastic, Inc. v. Harris*, __ F.3d__, 2001 WL 855516 at 9 (2nd Cir. 2001); *E.R. Squibb & Sons, Inc. v. Lloyd's & Companies*, 241 F.3d 154, 179 (2nd Cir. 2001); *Bolt Electric, Inc. v. City of New York*, 223 F.3d 146, 150 (2nd Cir. 2000); *Alexander & Alexander Services, Inc. v. These Certain Underwriters at Lloyd's, London, England*, 136

F.3d 82, 86 (2nd Cir. 1998).

Assuredly, the Court of Appeals affirmed an award of summary judgment upon singularly insufficient evidence, under a circumstance, i.e., resort to parol evidence, which, in and of itself, precludes an award of summary judgment as a matter of law.

II. The Court of Appeals, in Contravention of *Erie*, Disregarded New York's Common Law Rule Depriving Courts of the Power to Judicially Add Contract Conditions by "Interpretation" or "Construction"

Under New York's law of contracts, "[t]he courts may not rewrite a term of a contract by 'interpretation' when it is clear and unambiguous on its face." *Fiore v. Fiore*, 46 N.Y.2d 971, 973, 389 N.E.2d 138, 139 (NY 1979); See *Dreiss v. Dreiss*, 258 A.D.2d 499, 500, 684 N.Y.S.2d 627, 628 (NYAD 2nd Dep't 1999); *McWade v. McWade*, 253 A.D.2d 798, 799, 677 N.Y.S.2d 596, 597 (NYAD 2nd Dep't 1998). New York courts may not, under the guise of construction, write into a contract conditions which were not included by the parties, nor may courts construe the language of a contract so as to distort the contract's apparent meaning. *Macrae v. Dolce*, 249 A.D.2d 476, 477, 671 N.Y.S.2d 530, 531 (NYAD 2nd Dep't 1998); *Scalabrini v. Scalabrini*, 242 A.D.2d 725, 726, 662 N.Y.S.2d 581, 582 (NYAD 2nd Dep't 1997). See, also 22 NY Jur 2nd Contracts § 214 (Necessity of Construction; Plain or Ambiguous Language); 22 NY Jur 2d Contracts § 218 (Imposition of Additional Provisions or Obligations).

In decisions made prior to the issuance of the Summary Order in this action, the Second Circuit recognized,

as a binding limitation upon its adjudicatory powers, the foregoing state law principal. *Terwilliger v. Terwilliger*, 206 F.3d 240, 245 (2nd Cir. 2000); *Cruden v. Bank of N.Y.*, 957 F.2d 961, 976 (2nd Cir. 1992).

Unfortunately, by "interpret[ing CIR's contract] against the backdrop of a long-term, ongoing negotiation and contractual relationship" and by adding a contract-killing implied condition in the process, the Court of Appeals, in its Summary Order in this action, has contravened the foregoing state law limitation upon the interpretative power of courts in contract cases, and concomitantly, has abandoned the application of the *Erie* doctrine to state law contract issues.

III. The Grant of Summary Judgment Upon Woefully Insufficient Evidence Deprives CIR of its Jury Trial Right, and Overlooks CIR's Non-contractual Equal Protection Claim

To appropriately grant summary judgment, a court must apply the same standard as is applicable to a grant of a directed verdict. The court must not itself decide disputed issues of material fact or issues of credibility, which, if they exist, require denial of summary judgment before trial, and submission of the case to the jury at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As the evidence submitted by the City upon its motion is parol in nature, woefully inadequate, contradictory to the written contract, and hotly contested, the grant of summary judgment was clearly inappropriate, depriving CIR of its right to a jury trial. See U.S. Const., Amend. VII; Fed.R.Civ.P. Rule 38(a).

Additionally, CIR's equal protection claim (arising from the mayor's unprecedented removal of CIR's project from the City's normal development channels with the EDC,

which then was working upon harmonizing the construction of both CIR's project and the stadium, and from the coercing of a strategic partner of CIR to terminate is association, under threat of losing its other City projects) is not predicated upon a "property interest" (i.e., the contract), and itself warrants a trial. See *Willowbrook v. Olech*, 528 U.S. 562 (2000).

CONCLUSION

Respectfully, to preserve uniformity of contract interpretation in the federal courts sitting in the state of New York, and to secure in those courts the application of the *Erie* doctrine to state law contract issues, this petition for a writ of certiorari should be granted, and ultimately, the inappropriate grant of summary judgment against CIR should be reversed.

Respectfully submitted,

BARRY S. GEDAN
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Counsel of Record
17 Senate Place
Larchmont, NY 10538
914-968-0300

August 27, 2001

APPENDIX

United States Court of Appeals
for the Second Circuit
United States Courthouse
40 Foley Square, New York 10007
Roseann B. Mackechnie, Clerk

DC: EDNY
DC Docket: 00-cv-2233
DC Judge: Glasser
DC Mag: Chrein

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of May, two thousand one.

CONEY ISLAND RESORTS, INC.,
Plaintiff - Appellant,

dkt# 00-7970

V.

RUDOLPH GIULIANI, individually and as Mayor of the City of New York and THE CITY OF NEW YORK,

Defendants - Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Coney Island Resorts

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: s/
Beth J. Meador
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of April, two thousand and one.

PRESENT:

HON. GUIDO CALABRESI,
HON. ROSEMARY S. POOLER, *and*
HON. ROBERT D. SACK,
Circuit Judges.

CONEY ISLAND RESORTS, INC.,

Plaintiff-Appellant,

V.

SUMMARY ORDER
No. 00-7970

RUDOLPH GIULIANI, individually and as Mayor of the City of New York and THE CITY OF NEW YORK,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge).*

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is AFFIRMED.

For Plaintiff-Appellant: BARRY S. GEDAN, Larchmont, N.Y.

For Defendants-Appellees: ALAN BECKOFF *for* Michael D. Hess, Corporation Counsel of the City of New York, New York, N.Y. (Stephen J. McGrath, Susan M. Shapiro, and Jill Braverman *on the brief*).

I. BACKGROUND

Between 1984 and 1998, the City of New York (the "City") and Coney Island Resorts, Inc., ("CIR") engaged in lengthy negotiations aimed at developing Steeplechase Park in Brooklyn into an amusement park. Although a draft ground lease governing the development was negotiated, CIR's inability to secure adequate financing for the project remained a sticking point throughout the negotiations, with the City refusing to enter into the lease before CIR acquired satisfactory financing. In view of this difficulty, the City granted CIR several extensions on City-imposed deadlines for delivery of the lease. The first two extensions the City granted CIR contained express language reflecting the City's longstanding insistence that CIR procure financing, and stated that:

> The procurement of financing by CIR in form and amount satisfactory to the City remains [in the second extension letter, "continues to remain"] as one of the conditions to execution and delivery of [the negotiated] ground lease.

Coney Island Resorts, Inc. v. Giuliani, 103 F.Supp. 2d 645, 649 (E.D.N.Y. 2000).

The last three extensions, however, did not expressly condition entry into the lease upon CIR's procuring financing. Instead, these three extensions, and in particular the final extension, stated only that:

i. "As [a] condition to this extension, Coney Island Resorts ("CIR") shall make a payment to the Economic Development Corporation ("EDC") [of a specified amount by a specified deadline]"; and

ii. "in the event either CIR has failed to make the required payment within five business days of [a specified date] or has not executed or delivered the Ground Lease by [a specified date], CIR shall have no authority, right, designation or interest of any kind with respect to [the land at issue]."

CIR now claims that the final extension letter created a contract under which the City agreed to enter into the ground lease provided only that CIR performed the acts specifically identified in that letter, i.e., paid the extension fee and delivered a signed copy of the ground lease to the City by the requisite dates. And CIR, although it did not procure financing, did make the extension payment and did deliver a signed copy of the lease to the City before the expiry of the final extension. Nevertheless, in 1999, the City abandoned the amusement park project and instead, and without CIR's participation, constructed a baseball stadium. CIR claims

that in doing so, the City deprived it of its contractual right to the lease, in violation of the Due Process, Contract, Takings, and Equal Protection Clauses, and also the Fourth Amendment, of the federal Constitution.[1]

The district court granted summary judgment in favor of the City. It did so principally by reading the financing condition into the final extension letter on the grounds that, under New York law, the formal and talismanic use of language is not required in contract drafting and that contracts should be read to reflect the clear intent of the parties that make them. *See Coney Island Resorts, Inc.*, 103 F.Supp. 2d at 654-55 (citing *Archibald v. Panagoulopoulos*, 223 N.Y. 478, 488-89 (1922); *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917)). The district court determined that no rational juror could reach any conclusion other than that the parties to the final extension letter intended to maintain rather than abandon the financing condition that had so plainly dominated their earlier negotiations. Accordingly, the district court decided that CIR, which had not procured financing, enjoyed no contractual rights to the lease.

With the contract question decided in this way, the district court quickly dismissed the remainder of CIR's claims. Thus, the district court reasoned that because CIR had no right to enter into the ground lease, it had neither a property right to which its Due Process claim might attach nor a contract right to which its Contract Clause claim might apply. *Id.* at 655. Finally, the district court decided that CIR's remaining assertions -- involving claims (a) that the City's actions constituted a regulatory taking of certain land

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[1] In addition, CIR brought a claim based on principles of equitable estoppel, which the district court rejected, *see Coney Island Resorts, Inc.*, 103 F.Supp. 2d at 657 and which has not been renewed on appeal.

CIR owned adjacent to Steeplechase Park,[2] and (b) that the City ultimately rejected CIR's development proposal because CIR's president Horace Bullard is an African-American, thereby violating CIR's rights under the Equal Protection Clause of the Fourteenth Amendment -- were straightforwardly meritless.

CIR now appeals.

II. DISCUSSION

We affirm the decision below for substantially the reasons given by the district court. In particular, we agree that CIR's procurement of acceptable financing for the amusement park remained a condition to execution of the ground lease even under the final extension agreement and therefore that CIR, which never arranged financing, had no contractual right to enter into the lease.[3]

We find unpersuasive CIR's main objection to this conclusion -- that to read the financing-condition into the

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[2] On appeal, CIR also argues that the City's physical occupation of that land (through the construction of the baseball stadium) constituted a taking under the Fifth Amendment and a seizure under the Fourth Amendment. The conclusion that CIR had no rights in the land governed by the ground lease is, of course, fatal to these claims also.

[3] We therefore do not reach the district court's alternate suggestions, presented in dicta, that several of CIR's constitutional claims would fail even if CIR did have a contractual right to enter into the lease. *See, e.g., Coney Island Resorts, Inc.*, 103 F.Supp. 2d at 655 n.7 (concerning CIR's Due Process claim) and 655 (concerning CIR's Contract Clause Claim). We similarly decline to review the district court's suggestion, also presented in dicta, that an earlier New York State court Article 78 proceeding involving claims related to those presented in the case at bar was never validly commenced by CIR. *See id.* at 651 n. 4.

final extension agreement between the City and CIR violates the parol evidence rule since the condition did not appear in the writing memorializing that agreement. The New York State law of contracts has indeed adopted the parol evidence rule. *See Cruden v. Bank of New York*, 957 F.2d 961, 976 (2d Cir. 1992). But even though, as a general matter, that rule forbids reference to oral agreements or other external evidence that vary the terms of an unambiguous writing, the rule "does not, however, apply where the written contract was not intended to embody the entire agreement between the parties," *Fogelson v. Rackfay Constr. Co.*, 300 N.Y. 334, 338 (1950). Thus "[i]n a case where the contract is existing and valid but incomplete, parol evidence is admissible to complete the writing provided that all the particulars, upon inspection, plainly are not present and the parol evidence sought to be introduced is not contradictory of the written agreement," *Smith v. Slocum*, 420 N.Y.S.2d 814, 814-15 (4th Dep't 1979). Indeed, in *Lady Duff-Gordon* itself Judge Cardozo famously added a term to the contact there construed -- involving a promise by one party to use reasonable efforts to promote the other party's products -- that was not expressly contained in the writing.

The case at bar is plainly of the same sort: the final extension agreement nowhere states that it is fully integrated. Instead, it plainly reflects only a partial agreement to be interpreted against the backdrop of a long-term, ongoing negotiation and contractual relationship. The district court correctly determined that in light of this ongoing relationship, no rational juror could conclude anything other than that the City and CIR intended, in the final extension agreement, to maintain the financing condition.

III. CONCLUSION

We have reviewed all CIR's remaining claims and find them to be without merit.

Accordingly, the district court's grant of summary judgment in the City's favor on all claims is

AFFIRMED

For the Court,
ROSEANN B. MacKECHNIE
Clerk of Court

By: Lucille Carr

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CONEY ISLAND RESORTS, INC.,

MEMORANDUM and ORDER

Plaintiff,

- against - 00 CV 2233 (ILG)

RUDOLPH GIULIANI, individually and as Mayor of the City of New York, and THE CITY OF NEW YORK,

Defendants,

GLASSER, United States District Judge:

This action is before the Court on the defendants' motion for summary judgment, arising out of earlier proceedings on the plaintiff's application for declaratory and injunctive relief, decided against it for reasons set forth in a memorandum and order dated May 10, 2000, familiarity with which is assumed. See Coney Island Resorts Inc. v. Giuliani, No. 00-CV-2233, 2000 WL 808636 (E.D. N.Y. May 10, 2000). For the reasons that follow, the defendants' motion is granted, and the Complaint is dismissed.

BACKGROUND

Both the relevant factual background, and the parties' legal contentions have been supplemented by submissions from the parties, and by arguments made before the Court since the proceedings on plaintiff's earlier application. Thus, at the risk of some repetition of findings already made in the memorandum and order of May 10, a new and fully consolidated statement of that background, and of those, arguments, follows.

The relationship between the plaintiff, Coney Island Resorts Inc. ("CIR"), and the City began with a Request for Proposals in 1984 by the Parks Department, aimed at stimulating economic development in the Coney Island area of Brooklyn.[1] Plaintiff responded with a proposal to develop an amusement park on Steeplechase Park and Steeplechase Pier, and in response, the City entered into a license agreement with plaintiff, permitting it to operate such a park on City-owned property in the area.[2] Of significance to the factual issues on this motion is a provision of the license agreement concerning CIR's obligation to obtain project financing:

> This License is conditioned upon Licensee [i.e., CIR] securing a loan, syndication, cash, offering or other financing (in form and substance reasonably satisfactory to City) in an aggregate gross amount of not less than Three Million Dollars...

Bullard Aff., Exh. A at ¶ 6.

In early 1986, CIR began talking with the New York City Public Development Corporation (the "PDC"), hoping to obtain its assistance in the development of the contemplated amusement park. On October 30, 1986, CIR, the PDC, and the Parks Department issued a letter of intent, describing a $70 million, three-phase project to develop an amusement park on a single site to be composed of the City-owned Steeplechase properties, and certain contiguous properties to be purchased, or already purchased by CIR. The letter states:

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[1] In conjunction with its proposal, CIR posted a $10,000 "bid bond" with the Parks Department.

[2] CIR posted a $25,000 security deposit with the Parks Department at the time it executed the license agreement.

> The Developer [i.e., CIR] will submit to PDC and Parks, within 180 days after the execution of this letter, binding financial commitments, satisfactory to PDC and Parks, to develop, as applicable, the Initially Complete Project as described [elsewhere in the letter of intent]. PDC and Parks may require the Developer's binding financial commitments to be sufficient to take into account the possibility of operating losses during the first years of the Project. What shall constitute sufficient financing to allow for such operating losses shall be determined by PDC and Parks in the reasonable exercise of their discretion.

Brown Aff., Exh. A at 9-10.

From the outset, CIR encountered obstacles to the procurement of financing, and from the outset, PDC and the City evinced a willingness to work with CIR in overcoming those obstacles. Thus, when the letter of intent deadline for obtaining financing - May 1, 1987 - came and went, PDC extended it to October 1, 1987. Brown Aff., Exh. B. The PDC and the Parks Department also cooperated actively in efforts to secure certain preliminary legislative and municipal clearances for the project. In conjunction with efforts to convert the Steeplechase Park site into "mapped parkland," the City lobbied for, and obtained legislation from the New York State Legislature authorizing the leasing of such parkland, with specific reference to Steeplechase Park, CIR, and the contemplated transaction between CIR, the PDC, and the Parks Department. See Act of Sept. 1, 1988, ch. 632, 1988 N.Y. Laws 1231.

During several months of 1988, CIR engaged in some initially promising talks about financing with Security Pacific National Bank, in the light of which the outlines of the contemplated project became more expansive and ambitious. That initial promise faded by early 1989, however, when Security Pacific withdrew from talks, never to return.

Nevertheless, when the Board of Estimate authorized the City to enter into a long-term lease with CIR of City-owned property in Steeplechase Park for the purpose of developing an amusement park, it was the more ambitious plan formulated in collaboration with Security Pacific that was envisioned in its Resolution. See Bd. of Estimate Resolution, Cal. No. 21, May 23, 1989 (attached to Brown Aff., Exh B.). The Resolution recapitulates in some detail the material terms of the development leases that had been previously worked out between CIR and the City concerning the City-owned property, and two contiguous CIR-owned properties in the Steeplechase area. The Resolution concludes:

> RESOLVED, That the terms and conditions of the Development Leases and other legal instruments as hereinbefore stated are satisfactory, and that the Mayor, or Deputy Mayor, the Commissioner of Parks and Recreation and the Commissioner or Deputy Commissioner of General Services, as appropriate, are authorized to execute and deliver the instruments herein described and other instruments which may include such provisions, consistent with such terms and conditions, as the applicable above-named official shall determine to be necessary, appropriate or desirable to effect the transactions herein authorized and the Project herein described, provided that such instruments are approved as to form by Corporation Counsel and that the same are executed and delivered within 18 months after the date of this resolution, provided that such time may be extended for up to three years from the date of this resolution on account of litigation.

Id. at 7.

By November, 1990, CIR and the City had substantially concluded negotiating the terms of the lease referred to in the

Board of Estimate Resolution, and the City delivered a draft copy of such a lease to CIR. At that point, however, CIR had not succeeded in procuring financing for the development project satisfactory to the City in form and amount, and in a letter to CIR President Horace Bullard, dated November 22, 1990, the City, by Deputy Mayor Sally Hernandez-Pinero, signified as much:

> This letter confirms that the undersigned have concluded negotiating in material respects a ground lease between The City of New York ... as Landlord, and Coney Island Resorts, Inc..., as Tenant, for the project known as the Steeplechase Amusement Park. The procurement of financing by CIR in form and amount satisfactory to the City remains as one of the conditions to execution and delivery of such ground lease.

Brown Aff., Exh. C. In the same letter, the City extended the deadline for execution and delivery of a lease to November 25, 1991, and also imposed monthly payment obligations on CIR, in consideration of that extension, amounting to $5,000 for each month that passed without execution and delivery of the lease. Id.

A year later the parties were in essentially the same situation waiting for the procurement of satisfactory financing. Once again, this was reflected in a letter from the Ms. Hernandez-Pinero to CIR's Bullard, dated November 25, 1991, granting another extension for execution and delivery of the lease, this time to May 25, 1992:

> This letter reconfirms that the undersigned [namely, CIR and the City] have concluded negotiating in material respects a ground lease between the City of New York ... and [CIR]... for the project known as Steeplechase Amusement Park. The procurement of financing by CIR in form and amount satisfactory to the City continues to remain as one of the conditions to execution and delivery of such ground

lease.

Brown Aff., Exh. D. The November 25, 1991 letter continued the monthly payment obligation of $5,000 per month, in consideration of the extension. Id. The letter also made reference to a joint venture CIR was contemplating with an enterprise called Triple Five, Inc., and stated that if CIR failed within 60 days to produce evidence that it had entered into an agreement with Triple Five consummating that joint venture, it must pay the Economic Development Corporation (the corporate successor to the PDC) an additional $10,000 per month as of January 30, 1992, until execution and delivery of the lease. Id. The November 25, 1991 letter also provided that CIR "shall furnish to EDC within 60 days from the date hereof copies of bank letters of interest from institutional lender(s) and/or letters of interest from prospective equity investors for construction and permanent financing for the Steeplechase project in an amount not less than $200 million." Id. Finally, the letter imposed on CIR responsibility for emergency repairs to the Coney Island Pier, as well as liability for two penalty payments of $10,000 each if the repairs were not complete within 120 days. Id.

On May 22, 1992, the City granted another extension to CIR, to June 26, 1992, in consideration of an extension payment of $20,000. Brown Aff., Exh. E. On June 25, 1992, another extension was forthcoming, to July 27, 1992, in consideration of another $20,000. Brown Aff., Exh. F. On July 27, 1992, a final extension was granted, to September 25, 1992, once more in consideration of a $20,000 extension payment. Brown Aff., Exh. G. These three letters contain substantially identical wording. They each refer to extending "the time for execution and delivery of the Ground Lease specified in the Board of Estimate Resolution approved on May 23, 1989." They each identify a payment of $20,000 as a "condition of this extension." They each state that "in the event either CIR has failed to

make the required payment by [the specified extension date] or has not executed or delivered the Ground Lease by [that date], CIR shall have no authority, right, designation or interest of any kind with respect to the City-owned project parcels." Finally, each letter continues "CIR's rights and obligations under the license agreement between CIR and [the Parks Department], dated April 1, 1985." Brown Aff., Exhs. E, F, & G.

On September 22, 1992, Mr. Bullard signed the draft lease that had been provided to him in November, 1990, and on September 24 he delivered the signed draft lease to EDC, together with a check for $20,000. Mr. Bullard also wrote a letter, addressed to Deputy Mayor Barry F. Sullivan, which accompanied the lease and the check. In that letter, Mr. Bullard noted that he was taking this action "in order to protect the legal rights of the development package." Brown Aff., Exh. J. He also observed:

> I am submitting this signed document reluctantly, Because [sic] the City of New York has failed to extend the deadline date (September 25, 1992) for the delivery of the "Ground Lease". We would have much prefer [sic] to receive an appropriate extension of the deadline imposed by the City.

Id.

In its papers and in oral argument on its application for injunctive relief held on May 1, 2000, CIR urged that seen in the context of the extensive negotiations held beforehand, Mr. Bullard's signature and delivery of the draft lease operated to create a valid and enforceable lease. This theory was discussed and rejected in this Court's memorandum and opinion of May 10, 2000, but that discussion need not be recapitulated here, because in oral argument on July 7, 2000, CIR abandoned the argument, in favor of a new gambit. CIR now concedes that no lease was ever created. Rather, CIR argues that the City breached a valid and enforceable contract to enter into a lease, and by its conduct since the

breach, has abridged CIR's protected property interests, and thereby has violated its rights under the Due Process, Contract, Takings, and Equal Protection Clauses of the Constitution.

The City maintains that CIR did not fully satisfy its payment obligations under the extension letters. See Balder Second Supp. Reply Aff. at ¶ 10-14. Nevertheless, the City does not dispute that CIR did pay more than $148,000 for extensions of the deadline set forth in the Board of Estimate Resolution. Id.

Although the record reflects that the City gave some consideration to granting CIR additional extensions to obtain financing for the Steeplechase Project, there is no dispute that no such extension was actually forthcoming. See Brown Aff. at ¶ 34, Exh. I. Thus, on March 8, 1994, Deputy Mayor John Dyson wrote to Mr. Bullard to inform him that the City was finally terminating negotiations with CIR concerning the lease, effective in 10 days. Brown Aff., Exh. H.

In response, Mr. Bullard wrote a letter to Mr. Dyson, stating that the City's attempt to terminate negotiations was in violation of a two-year extension granted by the City on September 25, 1992. Brown Aff., Exh. N. Mr. Bullard also claimed that he had by now secured financing commitments from Donaldson, Lufkin & Jenrette and Fuji Bank, and urged the City to reconsider its termination decision. Id. In response, EDC Vice-President Angela Brown wrote to Mr. Bullard, in a letter dated April 6, 1994, that the City had no record of having granted an extension to CIR beyond September 25, 1992, and that in any event, the City "remains unconvinced that CIR has or will be able to procure a financing commitment from a potential source of construction and/or permanent loan financing any time soon." Brown Aff., Exh. O. Accordingly, Ms. Brown concluded, the City would not reconsider its decision to terminate discussions about the Steeplechase project with CIR. Id.

On April 4, 1994, the Parks Department, by a letter from Joanne Imohiosen of the Commissioner's Office, terminated CIR's license to the City-owned Steeplechase Park properties, effective April 15, 1994. Ms. Imohiosen's letter cited CIR's failure to proceed with repairs of the Coney Island Pier, about which CIR had been on notice since November, 1991. Balder Reply Aff. on Cross-Motion to Dismiss, Exh. A. Indeed, CIR had made two extension payments to the Parks Department, as a penalty for having failed to make the required repairs, and pursuant to the terms of the November 25, 1991 extension letter. See Brown Aff., Exh. D, Bullard Second Supp. Reply Aff., ¶¶ 10, 14. Ms. Imohiosen's letter also makes reference to a letter from the Parks Department to CIR, dated December 29, 1992, instructing CIR to proceed with the overdue repairs and submit documentation of having done so within 20 days. There is no evidence in the record to contravene Ms. Imohiosen's representation that CIR never made the repairs, and in these proceedings, CIR has not contested the lawfulness of the City's actions in terminating its license, or its authority to have done so.[3]

In March 1994, CIR did file an order to show cause in Supreme Court, New York County, seeking an order pursuant to Article 78 of the CPLR requiring the City to withdraw the Dyson termination letter, and to deliver a fully executed ground lease for Steeplechase Park to CIR. On April 11, 1994, Justice Arber orally denied CIR's application for a temporary restraining order, and refused to sign an order to show cause, which oral order was affirmed and explained by a written Decision and Order, dated May 11,

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[3] In losing its license, CIR also forfeited its $10,000 bid bond, and a $25,000 security deposit.

1994. Balder Aff., Exh. C.[4]

For about three years, matters between CIR and the City lay dormant. In 1997 and 1998, at CIR's prompting, the City conducted several meetings with CIR and various representatives of CIR. CIR has submitted affidavits from four of its agents or partners involved in those meetings, variously attesting to CIR's understanding at the time that the City intended to continue working with CIR to realize the Steeplechase Park project. The affidavits make plain that CIR was still actively soliciting potential partners for the amusement park project. They show that EDC was still willing at least to listen to CIR, when CIR requested a meeting for the purpose of presenting ideas or proposals to it. They also show that the Mayor's office held preliminary discussions with CIR about involving CIR in the newly envisioned project for Steeplechase Park, namely, building a minor league baseball stadium. What they do not show is that the City ever reconsidered its March, 1994 decision to

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[4] Although in its Memorandum and Order of May 10, 2000, this Court referred to the Article 78 action as "pending," the record has now been supplemented to make clear that because Justice Arber never signed the initial order to show cause, CIR never validly commenced its Article 78 proceeding. After Justice Arber's determination, CIR did nothing, effectively abandoning its action (which is marked in the records of the Office of Court Administration in Supreme Court of New York County as "disposed"). Shapiro Dec., Exh. G; see also Matter of Fry v. Village of Tarrytown, 89 N.Y.2d 714, 717 (1997) ("Since an unexecuted order to show cause is of no legal effect, its filing did not satisfy the provision of the commencement-by-filing statute requiring petitioner to file an order to show cause or a notice of petition along with the petition."); Matter of Gershel v. Porr. 89 N.Y.2d 327, 332 (1996) (where putative Article 78 petitioner had withdrawn his order to show cause, and Supreme Court had marked the proceeding as "dismissed," the Article 78 proceeding "was effectively abandoned because there was then no viable order to show cause or notice of petition in the file.")

terminate negotiations with CIR over the lease, or did anything to revive any commitment the City might still have been bound by in March, 1994. Indeed, the affidavits suggest to the contrary that CIR, when apprised of the City's plan to build a baseball stadium, immediately attempted to collaborate, suggesting a site other than the City-owned property in Steeplechase Park. See Scheffer Aff. at ¶ 8. The City entertained CIR's suggestion, although from the outset also made clear that if CIR was again unable to procure financing, the City would proceed without CIR. Id. at ¶ 10. Talks continued off and on for over a year, and CIR made several presentations to designees of the Mayor, hoping to persuade the City to work in conjunction with CIR on the development of the stadium. Significantly, on the account of CIR's own consultant, a sticking point appears to have been the fact that, although CIR did own certain contiguous parcels, it did not have a lease on the City-owned property in Steeplechase Park. Id. at ¶ 20. This fact was a matter of particular concern to CIR's development partners, New Roc Associates, which worried "that in order to obtain permanent bank financing for the project, the City would have to activate CIR lease." Id. in turn, New Roc was told by former EDC President Charles Millard "that he could not comment on, or activate CIR's lease, without the expressed permission of the Mayor, as this project was out of the hands of EDC, and under the control of the Mayor." Id.

Unfortunately for CIR, that permission was never forthcoming. The preliminary talks fell through, and the City proceeded on the baseball stadium without CIR. In January, 1999, Mayor Giuliani highlighted the stadium in his State of the City message. And, on April 12, 2000, the New York City Council voted to approve zoning changes necessary for the development of City-owned property in Steeplechase Park into a minor league baseball stadium. The City presently intends the stadium to be ready for baseball in June, 2001.

DISCUSSION

The standards governing a motion for summary judgment are familiar. Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Once the moving party has carried its burden under Rule 56, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. Franco v. Kelly, 854 F.2d 584, 587 (2d Cir. 1988). The court's function in ruling on a motion for summary judgment is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The mere existence of some alleged factual dispute between the parties, however, will not defeat an otherwise properly supported motion for summary judgment. Id. at 247-248.

Applying these principles, the ample record of this case - comprising a paper trail some 16 years long, including one prior and one pending judicial proceeding, legislative and municipal enactments, extensive correspondence, documents, and detailed affidavits from a halfdozen of the major players - compels the conclusion that the defendants' motion for summary judgment must be granted. The plaintiff has alleged violations of it rights under the Due Process, Equal

Protection, Contract, and Takings Clauses of the Constitution, but has failed to raise any colorable issue that it is entitled to relief on the basis of any of these constitutional doctrines. The plaintiff has also raised a claim of equitable estoppel, which is equally unavailing. The claims are treated in turn.

A. Due Process

CIR argues that the City has violated its property interest in the lease on the City-owned Steeplechase Park properties, which, though a creature of New York state law, is protected under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). CIR's account of the state law basis of its claim to a protected property interest shows that its claim of a due process violation is without merit.

As already noted, at oral argument CIR abandoned its theory that it was a party to a draft lease made valid and enforceable by its part performance thereunder, in favor of a new theory, also first broached at oral argument: that CIR fully performed under a contract to enter into a lease that is valid and enforceable on its face.[5] CIR's argument rests

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[5] In its papers, plaintiff argues that its payments to the City between December 1990 and September 1992, amounting to in excess of $148,000, sufficed as "part performance" under the draft lease. But the record makes clear, as plaintiff finally came to concede at oral argument, that these payments were made in consideration first, of extensions granted by the City of the original Board of Estimate deadline for execution and delivery of a ground lease; and second, of an extension granted for the purpose of allowing CIR to execute a joint venture agreement. Balder Supp. Reply Aff. at ¶ 10. In addition, $20,000 was paid as a penalty for failure to make timely repair to the Coney Island Pier, which failure led eventually to the revocation of CIR's license. Id.; Balder Reply Aff. on Cross-Mot. to Dismiss, Exh. A.

almost entirely on a somewhat tendentious view of the transactions between CIR and the City between May and September 1992. Specifically, CIR notes that in the last three extension letters from the City, dated May 22, June 25, and July 27 of 1992, there is no express mention of financing as a condition on the creation of a lease between CIR and the City. From this observation, CIR invites the Court to infer that financing had somehow fallen out of the contract between the parties, leaving CIR with only two performance obligations: to sign and deliver the draft lease, and to make all extension payments due under extension letters dating back to November 22, 1990.

This argument fails on both the facts, and the law. As to the facts, it begs the question: what was the mutually intended purpose of the extensions for which CIR was paying so handsomely? If, as of May 1992, the parties' understanding was that CIR had no performance obligations other than to sign and deliver the draft lease it had held since November, 1990, and to make all due extension payments, what conceivable end could signing yet another extension letter serve? The answer of course is plain on the record. As stated by Deputy Mayor Hernandez-Pinero in her November 25, 1991 letter to Mr. Bullard, the reason CIR needed the extensions in the first place was that it needed time to procure "financing....in form and amount satisfactory to the City .... " Brown Aff., Exh. D. In her affidavit of April 6, 1994, sworn to in support of the City's opposition to CIR's application for an order to show cause pursuant to Article 78, EDC Vice-President Angela Brown explained this rationale:

> Execution of the ground lease, however, was conditioned upon CIR securing firm financing for the construction and development of the proposed

> project. It was the intention of the parties that the developer could market the project to potential investors with a substantially completed draft lease in hand. A draft lease was prepared in order that CIR could further demonstrate to its potential financing sources that the City fully intended to provide CIR with a financeable leasehold interest in the property. Once CIR secured a firm commitment for financing, the parties could then make minor modifications to the draft ground lease to meet the requirements of the financing entity.

Brown Aff. at ¶ 25. There is not an iota of evidence in the capacious record before this Court to suggest that CIR ever secured "a firm commitment for financing," much less that such financial interest as it did generate was "in form and amount satisfactory to the City.[6] Though not for lack of trying, CIR simply failed to obtain the financing that was a

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[6] Plaintiff states in conclusory fashion that it "did procure commitments for financing." Pl. Opp. Mem. of Law at ¶ 7. But the record shows that the "commitments" referred to were, at best, vague expressions of preliminary interest. The most substantial communication, a letter from Fuji Bank dated March 16, 1994, states a potential interest in "the contractually obligated income portion of the transaction," and refers to a need to solicit "bankable sponsorship commitments for entertainment facilities." Brown Aff., Exh. L. Another letter from Donaldson, Lufkin & Jenrette, which was acting as a placement agent for the amusement park project at the time, expresses the hope that "sufficient financing" will soon be identified, "provided we can locate a participant/operator willing to proceed and operate the Park." Brown Aff., Exh. M. Even if this Court were to regard these letters as evidence of CIR's "commitments for financing," there would be no basis for regarding the City's assessment of them as arbitrary or capricious. The City, quite reasonably, remained "unconvinced that CIR has or will be able to procure a financing commitment from a potential source of construction and/or permanent loan financing any time soon." Brown Aff., Exh. O.

condition precedent on the lease from the outset of and throughout its dealings with the City. That fact alone suffices to explain why the lease was never executed and delivered, why it cannot be deemed valid and enforceable today, and why therefore it is not a protected property interest under the Due Process Clause.

New York contract law supports the same conclusion. Contracts are interpreted in light of all their surrounding circumstances and of the acts of the parties. Archibald v. Panagoulopoulos, 233 N.Y. 478, 488-89 (1922). Here the surrounding circumstances and the acts of the parties demonstrate that financing remained a condition precedent to execution and delivery of the lease throughout the entire negotiation process, including the period covered by the final three extension letters. From the project's conception with the Board of Estimate Resolution in 1989, it was understood that the Mayor and his designees were vested with discretion to execute and deliver the lease under such terms and conditions as they deemed "necessary, appropriate or desirable." Brown Aff., Exh. B at 7. Foremost among the terms and conditions imposed under this authority was the requirement that CIR obtain "financing in form and amount satisfactory" to the Mayor or his designees. As the Brown Affidavit from 1994 attests, the City provided a draft lease to CIR in 1990, as an aid to the procurement of that financing. The circumstances make the City's intent clear. Having told CIR that no lease could be executed absent firm financial commitments, yet knowing that securing such commitments in the context of a real estate deal is difficult absent evidence of a contemplated underlying property interest, the City gave CIR a document that would show prospective financiers what that property interest would look like were they to make a firm commitment to the envisioned project. The strategy did not work. CIR was unable to elicit that firm commitment, even with the draft lease in hand, and notwithstanding the City's diligent assistance, in extending

deadlines no fewer than five times. As a matter of law, the conclusion could not be plainer: even if, as CIR now maintains, the parties were contemplating a contract to enter a lease, a condition precedent to that contract was not satisfied. Consequently, there never was a contract. See Kapson Constr. Corp. v. Ara Plumbing & Heating Corp., 227 A.D.2d 484,485, 642 N.Y.S.2d.701,703 (2d Dep't 1996) ("Since the existence of the contract was premised on the satisfaction of a condition precedent, no contract arises 'unless and until the condition occurs'.") (quoting Calamari and Perillo, Contracts § 11 -5, at 440 (3d ed)).

Even more to the point here are the words of Justice Cardozo engraved on the memories of anyone who has taken first-year contract law:

> The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed....

Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91 (1917). The words expressly recapitulating CIR's obligation to procure financing as a condition precedent to execution and delivery of the lease may have been missing from the last three extension letters, but it would be the very epitome of primitive formalism to infer from that omission that it had somehow "fallen out" as a term of the agreement between the parties. Of course, it had not; as noted, that is the reason CIR continued to seek additional extensions. Thus, when CIR finally failed to obtain the financing it sought, and the City terminated negotiations with it, the City was not breaching any obligation to CIR. A transaction that had been contemplated simply failed to come to fruition. CIR, understandably aggrieved, does not thereby have a claim of

constitutional dimension.[7] Accordingly, its Due Process claim must be dismissed,

B. Contract Clause

The Contract Clause provides:

No State shall ... pass any ... Law impairing the Obligation of Contracts .... U.S. Const., Art. 1, § 10. The elements of a claim under the Contract Clause are well established: a contractual relationship; a change in law impairing that relationship; and, impairment that is substantial and unjustified. General Motors Corp. v. Romein, 503 U.S. 181, 185-86 (1992).

Here, plaintiff fails to make even a prima facie showing under any of the elements. First, as has already been established, there was never a contractual relationship. There were negotiations undertaken in the mutual hope of entering into a contractual relationship. And second, two of the three "changes in law" on the record - the 1988 enactment of the New York State Legislature, and the Board of Estimate Resolution - were made to assist CIR in its attempts to execute a contractual relationship that, in fact, never materialized. The third change in law is the City Council Resolution of this year, approving the City's plans to construct a baseball stadium in Steeplechase Park, but of course, that action did not impair any contractual relationship, the mere prospect of which had long since been extinguished. Accordingly, plaintiff's Contract Clause claim must be dismissed.

C. Takings Clause

The Takings Clause provides that "private property

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[7] Indeed, even if CIR had established a breach of contract, it would still not have shown a deprivation of property, since the mere breach of a contractual right is not a deprivation of property protected by due process. S&D Maintenance Co. v. Goldin, 844 F.2d 962, 970 (2d Cir. 1988); Walentas v. Lipper, 636 F. Supp. 331, 335 (S.D. N.Y. 1986).

[shall not] be taken for public use without just compensation." U.S. Const., Amend. V. This prohibition is applicable to the conduct of the states and their municipal subdivisions through the Fourteenth Amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).

Plaintiff raises no claim of physical occupation of its own property, so its takings claim is of the "regulatory" variety, and must rest on a showing of "legal interference with the physical use, possession or enjoyment of property or a legal interference with owner's power of disposition of the property." City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 255 (1971). Plaintiff contends that its parcels contiguous to the City-owned Steeplechase Park parcel have been rendered useless by the baseball stadium proposal, because the contiguous parcels are zoned exclusively for "amusement park and amusement park related uses." Bullard Aff. of June 12, 2000 at ¶ 15. Leaving aside whether this representation is accurate, it still falls well short of making out a regulatory takings claim. A regulatory takings claim is not ripe until the government "entity charged with implementing the regulations has reached final decision regarding the application of the regulations to the property at issue." Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985). CIR has not alleged that it has sought a new zoning designation of its contiguous parcels, assuming one is necessary. For its part, the City has made several verbal representations to this Court of its willingness in principle to work with landowners contiguous with development projects on City-owned property; the impression left is that it would be willing to work with CIR in conjunction with the proposed baseball stadium. Certainly there is no evidence to suggest that the City is impeding or has impeded any CIR initiative to develop the contiguous property in a way that would somehow complement the stadium project. It follows that CIR's takings claim must be

dismissed.

D. Equal Protection

Plaintiff's President, Mr. Bullard, alleges that the reason the City terminated negotiations with him is that he is African American, and Mayor Giuliani was animated by hostility towards him as an African American. Bullard Opp. Aff. at ¶ 17.[8] CIR claims that certain remarks by former EDC President Charles Millard support these charges. CIR claims that these allegations support a claim that its right to

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[8] Mr. Bullard makes this allegation in the course of asserting that CIR intends to move to amend its Complaint. Bullard Opp. Aff. at ¶¶ 17-21. Although no such motion was actually made, even if it had been, it would have to be denied. Under Rule 15(a), leave to amend should be freely given in the absence of countervailing factors such as undue delay, bad faith, undue prejudice to the opposing party, or futility of the amendment. Foman v. Davis, 371 U.S. 178, 182 (1962). An amendment would be futile if it could not survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. See S.S. Silverblatt, Inc. v. East Harlem Pilot Block-Bldg. 1 Hous. Dev. Fund Co., 608 F.2d 28,42 (2d Cir. 1979). In considering whether plaintiff's proposed amended complaint is futile, the Court should construe the proposed amended complaint in the light most favorable to plaintiff, Gabourel v. Bouchard Transp. Co., 901 F.Supp. 142, 144 (S.D.N.Y.1995) (citing Scheuer v Rhodes, 416 U.S. 232, 236 (1974)), and leave to amend should only be denied if plaintiff can prove no set of facts which would entitle her to relief. Id. (citing Dahlberg v. Becker, 748 F.2d 85, 88 (2d Cir.1984), cert.denied, 470 U.S. 1084 (1985)). Here, plaintiff would move to amend its complaint to state causes of action for monetary damages, a takings claim, a Contract Clause claim, and an equal protection claim. Because they were raised at least obliquely in plaintiff's papers and in oral argument, the three latter constitutional claims are disposed of herein, so amendment to state them as causes of action would be futile. As to the damages claim, it too is foreclosed, because, for reasons already stated, CIR never had an enforceable contract with the City or any of its agencies or designees. Accordingly, deeming that the plaintiff has moved to amend its complaint, the Court is compelled to deny that motion.

equal protection under the Fourteenth Amendment has been violated.

An equal protection claim requires proof that the plaintiff, compared with others similarly situated, was selectively treated on the basis of impermissible considerations, such as race. Crowley v. Courville, 76 F.3d 47, 52-53 (2d Cir. 1996). As already noted in this Court's Memorandum and Order of May 10, 2000, plaintiff has failed to adduce any evidence showing how, compared with others similarly situated, either CIR or Mr. Bullard was selectively treated. He has also failed to show that anything about the City's treatment of either CIR or Mr. Bullard was based on impermissible considerations. Mr. Bullard makes much of an alleged statement by EDC's Millard, made in October, 1998, to the effect that the Mayor's action in removing the Steeplechase Park amusement park from EDC was "unprecedented." Bullard Opp. Aff. at ¶ 11; Scheffer Aff. at ¶ 16. Mr. Bullard also points to a meeting held in late 1997 between Millard and one of CIR's representatives, in which the amusement park project was discussed and Millard made no mention of the baseball stadium proposal. Scheffer Aff. at ¶ 3. On their face, these incidents are manifestly insufficient to raise even a colorable equal protection claim. It follows that CIR's allegation of an equal protection violation must be dismissed.

E. Estoppel

Finally, plaintiff asserts that the City should be estopped, under principles of equitable estoppel, from "denying that they were negotiating with the Plaintiff in bad faith." Pl. Mem. of Law at ¶ 10. Plaintiff asserts that it incurred significant expenditures in the course of trying to bring the transactions here at issue to a close, thereby relying to its detriment on representations by the City made in the course of years of negotiation.

The law requires more than a showing of detrimental reliance on material representations by a plaintiff looking to

invoke equitable estoppel against a government or government agency. Petrelli v. City of Mount Vernon, 9 F.3d 250, 256 (2d Cir. 1993). Because an estoppel against the government implicates the "interest of the citizenry as a whole," Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 61 (1984), such an estoppel must be supported by proof that the government's conduct was willful, wanton, or reckless. FHM Constructors, Inc. v. Village of Canton Housing Authority, 179 F. Supp. 677, 682 (N.D.N.Y. 1992). It follows that equitable estoppel against the government is foreclosed "in all but the rarest of cases." New York State Medical Transporters Assoc. v. Perales, 77 N.Y.2d 126, 130 (1990) (citation and internal quotation marks omitted).

This is not one of those "rarest of cases." No doubt plaintiff did spend a good deal of money in the hope that the amusement park project would succeed. It did not, but the reason lies not in the City's wantonness or recklessness; the reason lies in CIR's failure to obtain the required financing. Accordingly, an estoppel does not lie, and plaintiff's claim to an estoppel must be dismissed,

CONCLUSION

For the reasons stated, the defendants' motion for summary judgment is granted in its entirety, and the Complaint is dismissed.

SO ORDERED

Dated: July 13th, 2000, Brooklyn, New York

I. Leo Glasser, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CONEY ISLAND RESORTS, INC,

JUDGMENT

Plaintiff, 00-CV-2233 (ILG)

- against -

RUDOLPH GIULIANI, individually
and as Mayor of the City of New York
and THE CITY OF NEW YORK,

Defendants

A Memorandum and order of the Honorable I. Leo Glasser, United States District Judge, having been filed on July 12, 2000, granting the defendants' motion for summary judgment in its entirety, it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendants; and, that the defendants' motion for summary judgment is granted in its entirety.

ROBERT C. HEINEMANN
CLERK OF COURT

Dated: Brooklyn, New York, July 17, 2000

427A-CIR Draft, 11/15/90

CONSOLIDATED AND RESTATED LEASE

between

THE CITY OF NEW YORK,

Landlord,

and

CONEY ISLAND RESORTS, INC.

Tenant

Dated as of September 22, 1992

Premises

Block 7072, part of Lot 1
Block 7072, part of Lot 14
Block 7073, Lot 1
Block 7074, Lots 1,20,170,190
Block 7074, Lots 4,6,23,89,105 and the following former streets: West 16th Street between Surf Avenue and Riegelman Boardwalk; West 19th Street between Surf Avenue and Riegelman Boardwalk;
Bowery between West 15th Street and West 16th Street; and Kensington Walk between Surf Avenue and Riegelman Boardwalk; Brooklyn, New York [...]

Section 13.03. Supervision of Architect. Any Construction Work (a) in connection with the Construction of the Project, or (b) the estimated cost of which is in the aggregate five percent (5%) of the Replacement Cost of all Improvements or more shall be carried out under the supervision of the Architect, who shall submit such progress reports to Landlord as Landlord shall reasonably request. The estimated cost of any Construction Work shall be determined by a design professional who shall be chosen by the agreement of Landlord and Tenant. If Landlord and Tenant cannot agree upon a design professional, such person shall be chosen by submission of the dispute to arbitration as provided elsewhere in this Lease.

Section 13.04. Conditions Precedent to Tenant's Commencement of Construction Work.

(a) Permits and Insurance. Tenant shall not commence any construction work unless and until (i) Tenant shall have obtained and delivered to Landlord copies of all necessary permits, consents, certificates and approvals of all Governmental Authorities with respect thereto and (ii) Tenant shall have delivered to Landlord certificates or memoranda of the policies of insurance required to be carried pursuant to the provisions of Article 7 hereof.

(b) Cooperation of Landlord in Obtaining Permits. Landlord, without charge to Tenant unless otherwise provided herein, shall cooperate with Tenant in obtaining, and facilitating the issuance of, the permits, consents, certificates and approvals required by Section 13.04(a) hereof and any necessary utility easements, and shall sign any application made by Tenant or other document (so long as such application or document is in accord with Requirements) required to obtain such permits, consents, certificates, approvals and easements. Tenant shall reimburse Landlord within ten (10) days after Landlord's demand for any reasonable cash out-of-pocket cost or expense incurred by Landlord (in its capacity as Landlord, not in its governmental capacity) in obtaining the permits, consents, certificates, approvals and easements required by Section 13.04(a) hereof.

(c) Approval of Plans and Specifications. Tenant shall not commence any Construction Work with respect to Capital Improvements having an estimated cost in excess of 5% of the Replacement Cost of the Improvements comprising the Project ascertained at the time of commencement of the Construction Work or if the Capital Improvement is a Class I Attraction, unless and until Landlord shall have reviewed and approved (such approval not to be unreasonably withheld) the proposed plans and specifications in accordance with the provisions of this Lease.

(d) Additional Conditions with Respect to Construction of the Project. Prior to commencement of Construction of the Project (i) Tenant shall obtain, or cause

to be obtained, and furnish to Landlord, (A) payment and performance bonds in forms and by sureties qualified to do business in New York State and reasonably satisfactory to Landlord, naming the Landlord, Tenant and each Recognized Mortgagee as co-obligees, each in a penal sum equal to the amount of the construction contract for the Project (or if there shall be no general construction contractor, Landlord may require payment and performance bonds from each trade contractor designated by Landlord, each in a penal sum equal to the amount of such trade contract) or (B) other security reasonably satisfactory to Landlord, including, without limitation, a letter of credit, provided the amount, form and issuer shall have been approved by Landlord (such approval not to be unreasonably withheld), and (ii) Tenant shall have arranged debt and equity financing in amounts to which Landlord and Tenant have agreed. With respect to (d)(i)(A) above, Landlord shall be deemed to have approved such bonds as are required by a Recognized Mortgagee so long as Landlord is named as a co-obligee and the bond is with a surety company qualified to do business in New York State.

Section 13.05. Completion of Construction work.

Upon substantial completion of Construction of the Project or of any Construction Work with respect to a Capital Improvement, Tenant shall furnish Landlord with (a) a certification (certified to Landlord) of the Architect (or, if pursuant to the provisions of section 13.03 hereof no Architect is required to be acting, a Representative of Tenant) that it has examined the applicable plans and specifications (that shall include the Plans and specifications in the case of Construction Work done in connection with the Construction of the Project) and that, in its best professional judgment, after diligent inquiry, to its best

THE CITY OF NEW YORK
OFFICE: OF THE MAYOR
NEW YORK, N.Y. 10007

SALLY HERNANDEZ-PINERO
DEPUTY MAYOR
Finance and Economic Development

November 22, 1990

Mr. Horace Bullard
President
Coney Island Resorts, Inc.
c/o Messrs. Lord Day and Lord, Barrett Smith
1675 Broadway
New York, New York 10019
Re: Steeplechase Amusement Park

Dear Mr. Bullard:

This letter confirms that the undersigned have concluded negotiating in material respects a ground lease between The City of New York (sometimes hereinafter referred to as the "City"), as Landlord, and Coney Island Resorts, Inc. ("CIR"), as Tenant, for the project known as the Steeplechase Amusement Park. The procurement of financing by CIR in form and amount satisfactory to the City remains as one of the conditions to execution and delivery of such ground lease. The Board of Estimate resolution approved on May 23, 1989 (Cal. No. 21) requires that such ground lease and other legal instruments (collectively, the "Ground Lease") be executed and delivered no later than November 23, 1990. (The parcels of land that are City-owned and are referred to in said Board of Estimate resolution are hereinafter referred to as the "City-owned Project Parcels".)

The City, acting through the Deputy Mayor for Finance and Economic Development, hereby extends the time for execution and delivery of the Ground Lease specified in said Board of Estimate resolution to November 25, 1991, provided that the following obligations are satisfied by CIR and that the other terms set forth below shall apply:

1. CIR shall pay to the New York City Public Development Corporation, on behalf of the City, a payment of $5,000 per month, beginning on December 1, 1990 and thereafter on the first day of each subsequent month until the earlier to occur of (i) execution and delivery of the Ground Lease or (ii) November 1, 1991. The City may terminate this extension immediately if any payment from CIR is not received when due. Of such payment obligation, the amount of $3,000 per month shall be deferred and accrued, without interest. Accordingly, upon execution and delivery of the Ground Lease, CIR will make a payment to the City in the amount of all such deferred and accrued payments. In the event that CIR does not execute and deliver the Ground Lease by November 25, 1991, the deferred portion shall be forgiven.

2. The Department of Parks and Recreation of The City of New York ("Parks Department") and its designees, licensees and concessionaires shall have the right to use all or any portion of the city-owned Project Parcels as the City shall designate on an exclusive basis during the period November 23, 1990 through November 25, 1991 for uses consistent with any Parks Department program or project, provided that if concerts are proposed for use on the City-owned Project Parcels, such use shall be permitted after consultation by the Parks Department with CIR, however, CIR shall have no right to approve such use.

3. CIR's rights and obligations under the license agreement between CIR and the Parks Department, dated April 1, 1985, as the same may have been amended from time to time (the "License Agreement") shall continue in full

force and effect, including but not limited to CIR's obligations to furnish insurance coverage, indemnify the City and maintain the licensed premises, as expressly provided in the License Agreement. Notwithstanding the foregoing, the City shall indemnify and hold CIR, its employees, agents and officers harmless on account of liability caused by the negligence or willful misconduct of the City, its employees, agents or officials, or its designees, licensees or concessionaires to the extent that such liability arises out of the use by the City, its designees, licensees or concessionaires of the City-owned Project Parcels per paragraph 2 hereof, unless such liability is the result of any actions or inaction by CIR, its employees, agents or officers. Furthermore, to the extent that any use of all or any portion of the City-owned Project Parcels by the City, its designees, licensees or concessionaires per paragraph 2 hereof results in a physical condition that may otherwise render such City-owned Project Parcels in violation of the License Agreement, CIR shall have no obligation to remedy or otherwise address such physical condition.

4. Except as may otherwise be provided in the License Agreement, in the event that CIR had not executed and delivered the Ground Lease by November 25, 1991, CIR shall have no authority, right, designation or interest of any kind with respect to the City-owned Project Parcels.

Please acknowledge by signing below that you understand and accept the terms of this extension of time to execute and deliver the Ground Lease.

Very truly yours,

Sally Hernandez-Pinero
Deputy Mayor for Finance and Economic Development
The City of New York

APPROVED AS TO FORM:

Leonard M. Wasserman

Acting Corporation Counsel

ACKNOWLEDGED AND ACCEPTED

CONEY ISLAND RESORTS, INC.

Horace Bullard, President

cc: Elizabeth Gotbaum - Department of Parks and Recreation
Carl Weisbrod - New York City Public Development Corporation

577-SAP

The City of New York, Office of the Mayor, New York, N.Y. 10007 - Sally Hernandez-Pinero - Deputy Mayor Finance and Economic Development, November 25, 1991

Mr. Horace Bullard, President
Coney Island Resorts
c/o Messrs. Lord Day and Lord, Barret-Smith
1675 Broadway New York, New York 10019

Dear Mr. Bullard

This letter reconfirms that the undersigned have concluded negotiating in material respects a ground lease between the City of New York (the "City"), as Landlord, and Coney Island Resorts, Inc. ("CIR") as Tenant, for the project known as Steeplechase Amusement Park. The procurement of financing by CIR in form and amount satisfactory to the City continues to remain as one of the conditions to execution and delivery of such ground lease. The Board of Estimate resolution approved on May 23, 1989 (cal No. 21) requires that such ground lease and other legal instruments (collectively, the "Ground Lease") be executed and delivered no later than November 23. 1990. (The parcels of land that are City-owned and are referred to in said Board of Estimate resolution are hereinafter referred to as the "City-owned Project Parcels".) By my letter to you of November 22, 1990, the City extended your time to procure financing and execute and deliver the ground lease to today.

Pursuant to your request, The City hereby extends the time for execution and delivery of the Ground Lease specified in said Board of Estimate resolution to May 25, 1992, provided that, and only for so long as, the following conditions are satisfied:

1. CIR shall pay to the Economic Development Corporation ("EDC"), on behalf of the City, a payment of $5,000 per month, beginning on December 1, 1991 and thereafter on the first day of each subsequent month until the

earlier of (i) execution and delivery of the Ground Lease or (ii) May 25, 1992. Of such obligation, the amount of $3,000 per month shall be deferred and accrued, without interest. Accordingly, upon execution and delivery of the Ground Lease, CIR will make a payment to the City in the amount of all such deferred and accrued payments, plus the $36,000 in payments already deferred and accrued as per the first extension letter dated November 22, 1990.

2. CIR shall furnish to EDC 60 days from the date hereof a copy of an executed joint venture agreement, partnership agreement, or any other such similar agreement between Coney Island Resorts and Triple Five, Inc. or an affiliate of Triple Five, or any other organization that can meet the requirements set forth herein. Should CIR fail to furnish such an agreement to EDC in the required timeframe, CIR shall make a payment to EDC of $10,000 per month ("the Extension Payment"), or part thereof, until such agreement is furnished to EDC. This Extension Payment, if to be made, shall be due on or before January 30, 1992, with additional payments due on the 30th day of each subsequent month until the foregoing documentation is delivered to EDC.

3. CIR shall furnish to EDC within 60 days from the date hereof copies of bank letters of interest from institutional lender(s) and/or letters of interest from prospective equity investors for construction and permanent financing for the Steeplechase project in an amount not less than $200 million.

4. Within 120 days from the date hereof, CIR shall have completed emergency pier repairs on the Coney Island Pier (which work is estimated to cost approximately $20,000). CIR shall be responsible for obtaining the prior approval of The Department of Parks and Recreation of The City of New York ("Parks Department") for such pier work. Should CIR fail to complete the above referenced work, CIR shall make up to two additional extension payments (the "Additional

Extension Payments") of $10,000 per month until the emergency work is completed. If due, the first Additional Extension Payment shall be due on March 25, 1992 with a second Additional Extension Payment due on April 25, 1992.

5. CIR's rights and obligations under the license agreement between CIR and the Parks Department, dated April 1, 1985, as the same may have been amended from time to time (the "License Agreement") shall continue in full force and effect, including but not limited to CIR's obligations to furnish insurance coverage, indemnify the City and maintain the licensed premises, as expressly provided in the License Agreement, and CIR shall so observe its obligations under said License Agreement. (Notwithstanding the foregoing, the City shall indemnify and hold CIR, its employees, agents or officers harmless on account of liability caused by the negligence or willful misconduct of the City, its employees, agents or officials, or its designees, licensees or concessionaires to the extent that such liability arises out of the use by the City, its designees, licensees or concessionaires of the City-owned Project Parcels as described in the paragraph immediately following, unless such liability is the result of any actions or inaction by CIR, its employees, agents, officers. Furthermore, to the extent that any use of all or any portion of the City-owned Project Parcels by the City, its designees, licensees or concessionaires, as described in the paragraph immediately following, results in a physical condition that may otherwise render such City-owned Project Parcels in violation of the License Agreement, CIR shall have no obligation to remedy or otherwise address such physical condition.) The Parks Department and its designees, licensees and concessionaires shall have the right to use all or any portion of the City-owned Project Parcels as the City shall designate on an exclusive basis during the period November 25, 1991 through May 25, 1992 for uses consistent with any Parks Department program or project, provided that if concerts are

proposed for use on the City-owned Project Parcels, such use shall be permitted after consultation by the Parks Department with CIR, however, CIR shall have no right to approve such use.

At the conclusion of the 180 day extension period provided for above, CIR shall, as evidence of its procurement of financing, furnish to EDC copies of firm commitment letters and/or executed equity subscription agreements for construction and permanent financing for the Steeplechase project in an amount not less than $200 million. Should CIR fail to furnish such firm bank letters and/or equity subscription agreements to EDC within the required timeframe, the designation of CIR as developer of the Steeplechase project shall terminate.

Except as may otherwise be provided in the License Agreement, in the event that CIR has failed to satisfy any of the above conditions for extension within five business days of the time prescribed above for performance, or CIR has failed to furnish EDC evidence of financing as described above within the time prescribed therefor, or CIR has not executed or delivered the Ground Lease by May 25, 1992, CIR shall have no authority, right, designation or interest of any kind with respect to the City-owned Project Parcels.

Please acknowledge by signing below that you understand and accept the terms of this extension of time to execute and deliver the Ground Lease.

Very truly yours,
Sally Hernandez-Pinero
Deputy Mayor for Finance and Economic Development
The City of New York

ACKNOWLEDGED AND ACCEPTED
Coney Island Resorts, Inc. by: Horace Bullard President

APPROVED AS TO FORM
Leonard M. Wasserman, Acting Corporation Counsel

cc: Elizabeth Gotbaum - Department of Parks and Recreation
Carl Weisbrod, New York City Economic Development Corp.

The City of New York, Office of the Mayor
New York, N.Y. 10007
Barry F. Sullivan, Deputy Mayor
Finance and Economic Development May 22, 1992

Horace Bullard, President
Coney Island Resorts
3333 Henry Hudson Parkway, Riverdale, New York 10463

Dear Mr. Bullard

Pursuant to your request, The City of New York hereby extends the time for execution and delivery of the Ground Lease specified in the Board of Estimate Resolution approved on May 23, 1989 (cal No. 21), to June 26, 1992. As condition to this extension, Coney Island Resorts ("CIR") shall make a payment to the Economic Development Corporation ("EDC"), on behalf of the City, the amount of $20,000, due on June 1, 1992.

Except as may otherwise be provided in the License Agreement between the Department of Parks and Recreation ("DPR") and CIR, dated May 1, 1985, in the event either CIR has failed to make the required payment within five business days of June 1, 1992 or has not executed or delivered the Ground Lease by June 26, 1992, CIR shall have no authority, right, designation or interest of any kind with respect to the City-owned Project Parcels.

CIR's rights and obligations under the license agreement between CIR and DPR, dated April 1, 1985, as the same may have been amended from time to time (the "License Agreement") shall continue in full force and effect, including but not limited to CIR's obligations to furnish insurance coverage, indemnify the City and maintain the licensed premises, as expressly provided in the License Agreement, and CIR shall so observe its obligations under said License Agreement. (Notwithstanding the foregoing, the City shall

indemnify and hold CIR, its employers, agents or officers harmless on account of liability caused by the negligence or willful misconduct of the City, its employees, agents or officials, or its designees, licensees or concessionaires to the extent that such liability arises out of the use by the City, its designees, licensees or concessionaires of the City-owned Project Parcels as described in the paragraph immediately following, unless such liability is the result of any actions or inaction by CIR, its employees, agents, officers.

Please acknowledge by signing below that you understand and accept the terms of this extension of time to execute and deliver the Ground Lease.

Very truly yours,

Barry Sullivan
Deputy Mayor for Finance and Economic Development in the City of New York

APPROVED AS TO FORM

By: Leonard M. Wasserman
Acting Corporation Counsel

ACKNOWLEDGED AND ACCEPTED

By: Horace Bullard, President
Coney Island Resorts, Inc

The City of New York, Office of the Mayor
New York, N.Y. 10007

Barry F. Sullivan, Deputy Mayor
Finance and Economic Development June 25, 1992

Horace Bullard, President
Coney Island Resorts
3333 Henry Hudson Parkway,
Riverdale, New York 10463

Dear Mr. Bullard:

Pursuant to your request, the City of New York hereby extends the time for execution and delivery of the Ground Lease specified in the Board of Estimate Resolution approved on May 23, 1989 (cal No. 21), to July 27, 1992. As condition to this extension, Coney Island Resorts ("CIR") shall make a payment to the Economic Development Corporation ("EDC'), on behalf of the City, the amount of $20,000, due by July 27, 1992.

Except as may otherwise be provided in the License Agreement between the Department of Parks and Recreation ("DPR") and CIR, dated May 1, 1985, in the event either CIR has failed to make the required payment by July 27, 1992 or has not executed or delivered the Ground Lease by July 27, 1992, CIR shall have no authority, right, designation or interest of any kind with respect to the City-owned Project Parcels.

CIR's rights and obligations under the license agreement between CIR and DPR, dated April 1, 1985, as the same may have been amended from time to time (the "License Agreement") shall continue in full force and effect, including but not limited to CIR's obligations to furnish insurance coverage, indemnify the City and maintain the licensed premises, as expressly provided in the License Agreement,

and CIR shall so observe its obligations under said License Agreement. (Notwithstanding the foregoing, the City shall indemnify and hold CIR, its employees, agents or officers harmless on account of liability caused by the negligence or willful misconduct of the City, its employees, agents or officials, or its designees, licensees or concessionaires to the extent that such liability arises out of the use by the City, its designees, licensees or concessionaires of the City-owned Project Parcels as described in the paragraph immediately following, unless such liability is the result of any actions or inaction by CIR, its employees, agents, and officers.)

Please acknowledge by signing below that you understand and accept the terms of this extension of time to execute and deliver the Ground Lease.

Very truly yours,

Barry F. Sullivan
Deputy Mayor for Finance and Economic Development
The City of New York

APPROVED AS TO FORM

By: Leonard M. Wasserman
Acting Corporation Counsel

ACKNOWLEDGED AND ACCEPTED

By: Horace Bullard, President
Coney Island Resorts, Inc.

The City of New York, Office of the Mayor
New York, N.Y. 10007
Barry F. Sullivan, Deputy Mayor
Finance and Economic Development July 27, 1992

Horace Bullard, President
Coney Island Resorts
3333 Henry Hudson Parkway, Riverdale, New York 10463

Dear Mr. Bullard:

Pursuant to your request, the City of New York hereby extends the time for execution and delivery of the Ground Lease specified in the Board of Estimate Resolution approved on May 23, 1989 (cal No. 21), to September 25, 1992. As condition to this extension, Coney Island Resorts ("CIR") shall make a payment to the Economic Development Corporation ("EDC"), on behalf of the City, the amount of $20,000, due by September 25, 1992.

Except as may otherwise be provided in the License Agreement between the Department of Parks and Recreation ("DPR") and CIR, dated May 1, 1985, in the event either CIR has failed to make the required payment by September 25, 1992 or has not executed or delivered the Ground Lease by September 25, 1992, CIR shall have no authority, right, designation or interest of any kind with respect to the City-owned Project Parcels.

CIR's rights and obligations under the license agreement between CIR and DPR, dated April 1, 1985, as the same may have been amended from time to time (the "License Agreement") shall continue in full force and effect, including but not limited to CIR's obligations to furnish insurance coverage, indemnify the City and maintain the licensed premises, as expressly provided in the License Agreement, and CIR shall so observe its obligations under said License Agreement. (Notwithstanding the foregoing, the City shall

indemnify and hold CIR, its employees, agents or officers harmless on account of liability caused by the negligence or willful misconduct of the City, its employees, agents or officials, or its designees, licensees or concessionaires to the extent that such liability arises out of the use by the City, its designees, licensees or concessionaires of the City-owned Project Parcels as described in the paragraph immediately following, unless such liability is the result of any actions or inaction by CIR, its employees, agents, and officers.)

The Parks Department and its designees, licensees and concessionaires shall have the right to use all or any portion of the City-owned Project Parcels as the City shall designate on an exclusive basis during the period July 27, 1992 through September 25, 1992 for uses consistent with any Parks Department program or project, provided that if concerts are proposed for use on the City-owned Project Parcels, such use shall be permitted after consultation by the Parks Department with CIR, however, CIR shall have no right to approve such use.

Please acknowledge by signing below that you understand and accept the terms of this extension of time to execute and deliver the Ground Lease.

Very truly yours,

Barry F. Sullivan
Deputy Mayor for Finance and Economic Development
The City of New York

APPROVED AS TO FORM
By: Leonard M. Wasserman
Acting Corporation Counsel

ACKNOWLEDGED AND ACCEPTED
By: Horace Bullard, President July 27, 1992
Coney Island Resorts, Inc.

Coney Island Resorts, Inc.

September 24, 1992

Barry F. Sullivan,
Deputy Mayor for Finance and Economic Development
The City of New York

Reference: The SteepleChase Coney Island Development.

Dear Mr. Sullivan,

I am submitting to the City of New York, through your Office a signed copy of the "Ground Lease" in order to protect the legal rights of the development package, as required by the Board of Estimate resolution approved on May 23, 1989 (cal No. 21).

Enclosed is a copy of a check in the amount of $20,000 payable to the Economic Development Corporation, covering the payment required under your last extension. The original of this check is today being delivered to the Economic Development Corporation.

I am submitting this signed document reluctantly, Because the City of New York has failed to extend the deadline date (September 25, 1992) for the delivery of the signed "Ground Lease". We would have much prefer to receive an appropriate extension of the deadline imposed by the City.

Sincerely Yours,
Horace Bullard, President

cc: Carl I Weisbrod, President
New York City Economic Development Corporation
110 William Street
New York, New York 10038

[...]
formulas, procedures, commitments or other methods as shall reasonably assure the City that it will realize the difference between 35% of the Garage Net Operating Revenues and 10%.

IN WITNESS WHEREOF, the Landlord and Tenant have executed this Lease as of the day and year first above written.

THE CITY OF NEW YORK

ATTEST:

[SEAL]

by:_____

_____

_____
City Clerk

Approved as to Form:

_____
Acting Corporation Counsel

_____

Coney Island Resorts, Inc.

By: Horace Bullard
President

Check:

CONEY ISLAND RESORTS INC. 703

9/24 1992

Pay to the
Order of Economic Development Corp. $20,000/xx

THE SUM 20000 DOLS 00 CTS

Chase Manhattan Bank, N.A.

000703 021000021 279 1 041128

FOR Penalties s/ Horace Bullard

Received Check # 703

s/Steven Fuld

STEVEN FULD 9/25/92

Check:

CONEY ISLAND RESORTS INC. 703

9/24 1992

Pay to the
Order of Economic Development Corp. $20,000/xx

THE SUM 20000 DOLS 00 CTS

Chase Manhattan Bank, N.A.

000703 021000021 279 1 041128

FOR Penalties s/ Horace Bullard

12 PAY TO THE ORDER OF 12
THE CHASE MANHATTAN BANK, N.A.
For Deposit Only
N.Y.C. Economic Development Corp.
012-1-022537

0464259

Chase Manhattan Bank

28 SEP 92

The City of New York, Office of the Mayor
New York, N.Y. 10007
John S. Dyson, Deputy Mayor
Finance and Economic Development March 8, 1994

Mr. Horace Bullard, President Coney Island Resorts, Inc.
3333 Henry Hudson Parkway, Riverdale, New York 10463
Re: Ground Lease: Steeplechase Amusement Park Project
Borough of Brooklyn

Dear Mr. Bullard:

Reference is hereby made to the contemplated ground lease (the "Ground Lease") between The City of New York (the "City"), as Landlord, and Coney Island Resorts, Inc. ("CIR"), as Tenant, as specified in the City's Board of Estimate Resolution approved on May 23, 1989 (Cal. No. 21) (the "BOE Resolution") for the development of the project known as Steeplechase Amusement Park ("Steeplechase Project"). Further reference is made to the letters dated November 22, 1990 and November 25, 1991 from Deputy Mayor Sally Hernandez-Pinero of the City and to the letters dated June 25, 1992 and July 27, 1992 from Deputy Mayor Barry F. Sullivan of the City to CIR (collectively, the "Extension Letters") by which the City extended the time for execution and delivery of the Ground Lease, in exchange for certain payments by CIR to the City as required under each of the Extension Letters.

The Extension Letters were provided in order to afford CIR additional time to procure firm commitments for construction and permanent financing for the development of the Steeplechase Project as stipulated by the BOE Resolution and the Ground Lease. CIR has on several occasions indicated to the City, through its discussions with staff of the New York City Economic Development Corporation

("EDC"), that it had lined-up a potential financing source and that it was preparing to file loan applications with one or more institutional lenders and/or other sources of credit. However, in the period since the date of such Board of Estimate Resolution and since the Extension Letters were sent, CIR has provided no evidence to EDC of any progress in procuring financing. In fact, despite its stated plans to do so, CIR has failed to supply evidence that it has submitted a financing application that is under active consideration by a financing institution capable of providing construction or permanent financing for the Steeplechase Project. Thus, CIR has not met the requisite condition of procuring financing, thereby failing to meet the preconditions for executing and delivering the Ground Lease.

Additionally, CIR has failed to make all the necessary payments required under each of the Extension Letters, resulting in a shortfall of $24,000 that has not been received by EDC as of September 25, 1992.

Since CIR has not made material progress in fulfilling the conditions needed to maintain its rights to continue negotiations to the Ground Lease with the City, please be advised that effective as of March 18, 1994, the City hereby terminates negotiations with CIR for the Ground Lease and terminates all right, authority, designation or interest of any kind by CIR in the City-owned Project Parcels.

If you need any further clarification on this action and/or would like to convene a meeting concerning this letter, please contact New York City Economic Development Corporation, Attn: Angela Brown, Vice President for Development, Borough of Brooklyn, at (212) 312-3861, before March 18, 1994.

Sincerely,
John S. Dyson
Deputy Mayor for Finance and Economic Development
The City of New York

Donaldson, Lufkin & Jenrette
DLJ Real Estate, Inc. - 140 Broadway, New York, New York 10005-1255 - (212) 504-3000

Charles S. Bern
Senior Vice President
(212) 504-3613

March 11, 1994

Mr. Horace Bullard
Chairman
Coney Island Resorts, Inc.
3333 Henry Hudson Parkway
Riverdale, NY 10463

Re: Coney Island Theme Park, (the "Project")

Dear Horace:

At your request I will attempt to update you as to the financing on the above Project. Based on the facts provided by you, we have determined that the total costs involved in bringing this Project to fruition would be $450,000,000.00.

We believe that we have identified sufficient financing to fund this Project provided we can locate a participant/ operator willing to proceed and operate the Park. We are now in discussion with these entities and believe that within the next 120 days we can resolve this issue.

Very truly yours,

Charles S. Bern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of:
CONEY ISLAND RESORTS, INC., AFFIDAVIT

Petitioner, Index No. 108068/94

For a Judgment Pursuant to CPLR Article 78

- against -

JOHN S. DYSON, as Deputy Mayor of the City of New York, for Finance and Economic Development and THE CITY OF NEW YORK,

Respondents,

STATE OF NEW YORK)
COUNTY OF NEW YORK):SS

ANGELA BROWN, being duly sworn, deposes and says:

1. I am a Vice President for Development, Borough of Brooklyn, of the New York City Economic Development Corporation ("EDC"). I have been involved in EDC's efforts, on behalf of respondent the City of New York ("City"), to bring about the proposed Steeplechase Amusement Park, a new amusement park proposed for a site in Brooklyn in the heart of Coney Island's amusement district, to be developed by Coney Island Resorts, Inc. ("CIR"), the petitioner in this proceeding. [...]

8. I am informed that by agreement dated April 1, 1985, Parks entered into a license agreement with CIR granting it the exclusive use and occupancy of the licensed property, including the use of any equipment and other City-owned

property situated on it, for the construction, operation and management of an amusement park and use of the pier and sublicensing of concessions. This license agreement is not the subject of this proceeding.

9. It is my understanding that the license was for a ten year term with an option to renew for an additional ten year period. The license was conditioned upon CIR obtaining financing of not less than $3 million. The fee structure in the license required CIR to pay 5% of gross receipts annually up to the first $4 million and 1% of gross receipts over $4 million. The license agreement also acknowledged CIR's interest in seeking a lease once it had acquired the adjacent parcel on which a giant roller coaster was situated.

10. Having purchased the adjacent parcel, CIR approached PDC in or about early 1986 seeking assistance in developing the amusement park, in acquiring adjacent City-owned (non-parkland) property and in obtaining the necessary enabling legislation to convert the license agreement into a lease. By this time, the scope of the project had been substantially expanded. The modest $3 million development contemplated in the license agreement had become a $70 million amusement park.

11. PDC staff believed that CIR's development plan, although laudable, was seriously deficient in three ways. First, PDC staff agreed with CIR that securing the magnitude of the proposed private investment was not possible under the terms of a revokable license agreement and that only a long term lease would prove financeable. [...]

that the mayor, or his designee, are "... authorized to execute and deliver the instruments herein described and other instruments which may include such provisions, consistent with such terms and conditions, as the applicable above-named official shall determine to be necessary, appropriate or desirable to effect the transactions herein authorized and the Project herein described...." Exhibit B, ¶

8, p. 7. The Resolution further specified that the project instruments were to be executed and delivered within 18 months of its adoption, and that this period could be extended for up to three years on account of litigation. Id.

24. Having received the necessary approvals for the disposition of the City-owned parklands, I am informed that by November of 1990, representatives of the parties had substantially negotiated a ground lease in all material respects in conformity with the Board of Estimate authorizing resolution. The material terms of the ground lease were embodied in a draft lease dated November 15, 1990.

The Extensions to Permit CIR to Obtain Firm Financing Commitments

25. Execution of the ground lease, however, was conditioned upon CIR securing firm financing for the construction and development of the proposed project. It was the intention of the parties that the developer could market the project to potential investors with a substantially completed draft lease in hand. A draft lease was prepared in order that CIR could further demonstrate to its potential financing sources that the City fully intended to provide CIR with a financeable leasehold interest in the property. Once CIR secured a firm commitment for financing, the parties could then make minor modifications to the draft ground lease to meet the requirements of the financing entity. [...]

of the ground lease. Apparently, Mr. Bullard executed the ground lease on or about September 22, 1992 and delivered it to PDC on or about September 24, 1992. See the letter dated September 24, 1992 from Mr. Bullard to former Deputy Mayor for Finance and Economic Development Barry F. Sullivan, a copy of which is attached as Exhibit I.

37. I am informed by counsel the Mr. Bullard's execution and delivery of the draft ground lease has no legal force and effect. The execution of the ground lease by the parties was conditioned upon CIR's procuring firm financing

in a form and amount satisfactory to the City. CIR had no financing. The draft lease that CIR signed was clearly marked a "draft". It had not been, as required by the Resolution, approved as to form by the Corporation Counsel. Furthermore, I am informed by counsel, had this been the final lease, EDC would have forwarded it as a mere solicitation to offer and not an offer itself. This draft ground lease was never signed by the City. Thus, Mr. Bullard's signature is a nullity and confers no legal rights. I am informed by counsel that this hollow action of signing and delivering a draft lease does not, as he argues, "protect the legal rights of the development package, as required by the Board of Estimate resolution approved on May 23, 1989 [sic] (cal No.21) [sic]". See the letter dated September 24, 1992 from Mr. Bullard to Deputy Mayor Sullivan, a copy of which is attached as Exhibit J.

38. I am informed by counsel that Mr. Bullard's delivery of the $20,000 required by the July 27, 1992 extension letter, a requirement for receiving the extension to September 25, 1992, fails to evidence or afford him any extension rights past the September 25, [...]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CONEY ISLAND RESORTS, INC.,
Plaintiff,

- against -

RUDOLPH GIULIANI, individually and as Mayor of the City of New York, and THE CITY OF NEW YORK,

Defendants.

AFFIDAVIT IN OPPOSITION TO MOTION FOR INTERIM INJUNCTIVE RELIEF AND IN SUPPORT OF CROSS-MOTION to Dismiss

CV 002233 (ILG)

STATE OF NEW YORK)
COUNTY OF NEW YORK) :SS

ROBERT W. BALDER, being duly sworn deposes and says:

1. I am a Senior Vice President for Real Estate in the New York City Economic Development Corporation ("EDC"). EDC has acted as a representative of defendant City of New York ("City") in connection with the challenged transaction that is the subject of this lawsuit.

2. I make this affidavit in opposition to plaintiff Coney Island Resorts, Inc.'s ("CIR") request for interim injunctive relief and in support of defendants Rudolph Giuliani's, individually and as Mayor of the City, and City's cross-motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the complaint for failure to state a claim upon which relief can be granted on the grounds that plaintiff has no property rights and has suffered no deprivation of its due process or equal protection rights, and this Court should decline to exercise supplemental jurisdiction over any remaining state law claims. [...]

Id., ¶¶ 10-31. Parks and PDC worked with CIR to obtain state legislation permitting the leasing of certain parcels of City-owned parkland as well as Board of Estimate approval for the demapping of certain streets and authorization of a long-term leasehold of the project site to CIR for the development of a first class amusement park, including an accessory parking facility. Id., ¶¶ 20-22.

12. CIR, however, did not have the financial backing required to realize the proposed project. Representatives of the parties negotiated the material terms of a ground lease, which were embodied into a draft Consolidated and Restated Lease dated November 15, 1990, so that CIR could demonstrate to potential financing sources that the City fully intended to provide CIR with a financeable leasehold interest in the project property and could market the project to potential investors with a substantially completed draft lease in hand. Id., ¶¶ 24-25. It was contemplated that once CIR secured a firm commitment for financing, the parties could then make modifications to the draft ground lease to meet the requirements of the financing entity. Id.,¶ 25.

13. Execution of the ground lease was conditioned upon CIR's securing firm financing for the construction and development of the proposed project. Id. The Board of Estimate authorizing resolution specifically provided that the project instruments were to be executed and delivered within 18 months of its adoption, but that this period could be extended up to three years on account of litigation. Id., ¶ 23. (The Board of Estimate authorizing resolution, Cal. No. 21 adopted on May 23, 1989, is attached to the Brown Aff. as Exhibit B.) The City subsequently extended CIR's time to secure financing through September 25, 1992. Exhibit B, Brown Aff., ¶¶ 26-31.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of:

CONEY ISLAND RESORTS, INC.,
Petitioner,
For a Judgment Pursuant to CPLR
Article 78
-against-
JOHN S. DYSON, as Deputy Mayor of
the City of New York, for Finance
and Economic Development and THE
CITY OF NEW YORK,
Respondents.

STATE OF NEW YORK)
COUNTY OF THE BRONX):SS

SUPPLEMENTARY AFFIDAVIT IN SUPPORT OF APPLICATION FOR TRO & PRELIMINARY INJUNCTION)
Index No. 108068/94
Assigned to : Honorable CAROL ARBER, Justice IAS Part 1, 80 Centre St. Room 106

HORACE BULLARD, being duly sworn, deposes and says that:

1. I respectfully submit this further affidavit in support of petitioner, CONEY ISLAND RESORTS, INC.'s application for a Temporary Restraining Order and Preliminary Injunction. Also submitted herewith is petitioner's memorandum of law demonstrating unequivocally that the March 8, 1994 letter from respondent, Deputy Mayor JOHN S. DYSON, (annexed as Exhibit "4" to the petition) purporting to terminate CONEY ISLAND

RESORTS' "right, authority, designation or interest ... in the City-owned Project Parcels" of land required by CONEY ISLAND RESORTS for a major and vital redevelopment Project, constitutes an act beyond the respondent's [...] without true compensation.

62. Unfortunately, notwithstanding CONEY ISLAND RESORTS' major concessions to the CITY during the forced renegotiations, due to the CITY's aforementioned delay, SONYMA, which had offered to guaranty much of the $55,000,000.00 investment, lost interest in the Project.

63. However, neither I nor my co-investors were disheartened. To the contrary, we re-doubled our efforts to develop the site.

64. In 1987 the CITY-driven renegotiations were completed, and the London Based Theme Park Division of Security Pacific Bank, a major U.S. banking institution, took a strong interest in the Project. That Bank then agreed to serve as the lead financing institution, on condition that the Project's scope would be increased from a $55,000,000.00 amusement park to a $220,000,000.00 family-oriented theme park of world-class proportions. See Exhibit "4" hereto, a July 15, 1988 memorandum of the New York City Public Development Corporation whose last paragraph states:

> "A milestone as important as all those described above occurred in the Spring of 1988, when CIR secured the participation of a major North American bank, Security Pacific, to underwrite the financing of this entire project. Security Pacific has committed to finance this project, contingent upon obtaining all public approvals. The City has had numerous meetings with Security Pacific in order to discuss the timing and scope of financing."

65. The necessary consents for long-term leasing of the City-owned Project Parcels were obtained from the State legislature.

66. Unfortunately however, the various CITY

agencies involved were unable to coordinate with sufficient rapidity to move the necessary Board of Estimate Resolution apace.

67. Thus, despite Security Pacific Bank's enthusiasm to move ahead with the Project, the approval processes amongst the various CITY agencies proved to be glacially slow.

68. Therefore, the Board of Estimate Resolution authorizing the lease of the City-owned Project Parcels was not enacted until May 23, 1989. This Resolution is annexed as Exhibit "5" hereto.

69. The financing of the Project could not realistically proceed for 4 months after enactment of the resolution, to allow for the statutory limitations period to expire, within which a taxpayer's or environmental challenge to the resolution might arise.

70. It was during this waiting period that Security Pacific Bank, then approximately the sixth largest financial institution in the United States, and now non-existent, was struck by what was to become known as the "banking crisis". The bank found itself severely embarrassed, facing a liquidity crisis, and its Theme Park Division literally fell apart.

71. Had the CITY not procrastinated and delayed and renegotiated, the Project would have been financed and would have been underway. It could have easily been underway at $55,000,000.00, with the backing of SONYMA. It would have been underway with the backing of the once solvent Security Pacific Bank at $220,000,000.00.

72. However, because of the delay, we found ourselves, in September of 1989, desperately seeking alternate financing sources in a financial market that was collapsing around us.

73. We tried other funding sources at that time, to no avail.

74. Merely by way of example, I annex as Exhibit "6" hereto a September 18, 1989 fax from Electra Leisure

Corporate Finance Ltd., in London. Electra was another theme park financing group, well below the stature of Pacific Security Bank, that unsuccessfully attempted to put together financing for us. Electra's letter discusses the demise of Security Pacific Bank's Theme Park Division.

75. I cannot overemphasize that the first opportunity that the Project was afforded by the CITY to come forward with its financing was September of 1989, four months after the enactment of the Board of Estimate Resolution. Therefore, our efforts must be measured from that date, and not before, with the measurement tempered by the dual handicaps of the banking crisis and the generally uncooperative or dilatory performance of the CITY agencies.[1]

76. Obviously, financing in the range of hundreds of millions of dollars, is not available at the drop of a hat.

77. Financing of this scope requires a financial assemblage far more complex than the creation of a real estate assemblage. The usual approach to creating such a financing assemblage has a major financial institution occupying the lead position both as a financing institution and financing coordinator, bringing other conventional and/or non-conventional sources of financing on line to complete the package. In the process, complex negotiations are required as the interested sources of financing jockey for the available

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[1] I also ask that this Court kindly judicially notice that large development projects in the City of New York frequently take from 10 to 20 years to proceed from conception to completion, and the time that this Project has taken to date, particularly considering the extensive nature of the required environmental review and the impact of the banking crises, is not out of the ordinary. In fact, had the City not delayed the project through its compelled sweeping renegotiation process, this Project, with Security Pacific Bank's funding, would have been completed in far less time than most projects of its scope.

senior, subordinate and pari passu positions.

78. Realistically, starting from scratch with a new financial institution, the process takes a good couple of years to complete.

79. With the collapse of Security Pacific Bank, we turned to Electra, at the bank's recommendation, in the hope that Electra could pick up the pieces, but it could not. Our dealings with Electra consumed approximately six months.

80. Thereafter, interest was expressed by Bankers Trust, and by a financial group associated with Madison Square Garden. However, a CITY official dealt inappropriately with the Madison Square Garden investors, causing them to lose interest, and Bankers Trust simply could do nothing in the atmosphere of crisis that then existed in the banking industry.

81. It became apparent that the Project, as was the case with other nascent large scale ventures, must wait out the banking crisis before financing on the scale required would become available. However, we did not wait passively, but continued our earnest efforts. [...]

25, 1991 extension agreement is also a contract between CONEY ISLAND RESORTS and the CITY to enter into a lease, subject only to CONEY ISLAND RESORTS meeting the financing requirements and signing and delivering the lease by the extension's expiration date.

119. As the May 25, 1992 expiration date of the aforementioned extension approached, it became apparent to myself and the CITY that it was counter-productive to impose a pre-lease financing condition upon the extensions. In fact, it truly was not in good-faith for the CITY to have done so in the first place, as the CITY's prior delay caused the financing problem, by throwing the financing date for the Project into the midst of the banking crisis. Moreover, realistically, to conclude the financing, the lease execution must precede the loan closing.

120. Therefore, a new extension was entered into,

dated May 22, 1992 (annexed as Exhibit "10" hereto) , which completely omitted the requirement for pre-lease financing.

121. In place of the pre-lease financing requirement, the CITY instead imposed a $20,000.00 penalty for the extension, a penalty that CONEY ISLAND RESORTS paid.

122. As shown by the second paragraph of the May 22, 1992 extension, this extension was short term, a little over a month, (through June 26, 1992), with the only pre-condition to the entering of the lease being the aforementioned $20,000.00 penalty payment and the execution and delivery of the lease by CONEY ISLAND RESORTS on or before June 26, 1992, the expiration date of that extension.

UNITED STATES DISTRICT COURT:
EASTERN DISTRICT OF NEW YORK

DOCKET NO.

CONEY ISLAND RESORTS, INC.,

Plaintiff,

-against-

COMPLAINT
JURY
DEMANDED

RUDOLPH GIULIANI, individually and as Mayor of the City of New York, and THE CITY OF NEW YORK,

Defendants.

Plaintiffs, by its attorney Leopold Kaplan, Esq., complaining of the defendants, alleges:

Jurisdiction and Venue

1. Jurisdiction is alleged pursuant to 28 U.S.C. § 1343(3), 42 U.S.C. § 1983, and 42 U.S.C. § 1988 in that the above entitled action is brought to redress deprivation under color of law, custom and usage, rights secured by the Constitution of the United States. Specifically, defendants Rudolph Giuliani and the City of New York have violated plaintiff's right to equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States, due process of law secured by the Fourteenth Amendment to the Constitution of the United States and the right to be free of unreasonable seizures secured by the Fourth Amendment to the United States Constitution.

2. Venue is in the Eastern District of New York pursuant to 28 U.S.C. § 1391 (b)(2) in that the real property that is the subject of this action is located in the

Eastern District of New York.

Facts

3. Plaintiff Coney Island Resorts, Inc. (hereafter "CIR"), is a Delaware corporation authorized to conduct business in the State of New York.

4. Defendant New York City (hereafter "defendant City") is a municipal corporation duly constituted pursuant to the laws of the State of New York.

5. Defendant Rudolph Giuliani (hereafter "defendant Mayor") is a natural person and Mayor of the City of New York.

6. CIR was formed for the purpose of constructing, developing and conducting a family amusement and theme park at Steeplechase Park in the Coney Island section of Brooklyn, NY, in the Eastern District of New York.

7. In 1984, CIR was chosen by defendant City to develop, construct and operate an amusement park on property owned by the City in Steeplechase Park after a solicitation to develop by "Request for Proposal" process, the fourth such solicitation in four years; one other proposal was submitted but deemed unacceptable.

8. On April 1, 1985, CIR entered into a License Agreement with the City's Department of Parks whereby CIR would develop the area and construct, operate and manage the City owned property as an amusement park and related uses.

9. The License Agreement contemplated that plaintiff would purchase additional parcels of property in Steeplechase Park and apply to the state for a license to lease

the City owned parkland [1] (License Agreement at paragraphs 15 and 16) in order to construct a large theme park on the combined assemblage consisting of the city owned parkland and the additional parcels purchased.

10. For the purpose of developing and constructing the family amusement and theme park at Steeplechase Park in the Coney Island section of Brooklyn, CIR, in the names of corporations formed for this purpose and controlled by CIR, obtained control of the fee to the parcels of real property located within Steeplechase Park in the Coney Island section of Brooklyn and referred to in the License Agreement.

11. However, the parcels of which CIR obtained control are not contiguous to each other but are separated by parcels that are the property of defendant City and that are designated parkland. Therefore, to create a single assemblage, CIR was required to seek the approval of the New York State legislature to lease the parkland from defendant City.

12. By statute approved September 1, 1988 (Unconsolidated Laws, 1988, Chapter 632), by the legislature if the State of New York, defendant City was authorized to lease and otherwise alienate to CIR, including by exchanging parcels so that each party's parcels will be contiguous, those parcels of real property owned by defendant City and located in the Coney Island section of Brooklyn, NY, and known collectively as Steeplechase Park subject to approval by the New York City Board of Estimate.

13. In a memorandum in support of an extension of the time period within which to complete preliminary approval processes for the legislation, defendant City's

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[1] Parkland may be licensed without state approval but to lease it requires the approval of the state legislature.

Legislative Representative submitted a memorandum which stated that

> CIR's proposal was accepted and a license agreement was entered into April 1, 1985. CIR has started to develop the proposal and obtain the necessary approvals in order to procure a lease so that final commitments to long term financing and construction can be acquired.

14. By resolution after public hearings dated May 23, 1989, the New York City Board of Estimate approved the leasing to CIR for a period of ninety-nine years of the parcels owned by defendant City and known collectively as Steeplechase Park subject to conditions contained in the resolutions of the New York City Board of Estimate.

15. Among the requirements set forth by the Board of Estimate was that the lease to the properties be executed by CIR no later than November 23, 1990, in a form approved by the Corporation Counsel of the City of New York. However, the time limit within which to execute the ground lease was subject to written extension executed by the parties.

16. In or about November, 1990, corporation counsel submitted to CIR the lease in a form approved by the Corporation Counsel.

17. Extensions of the time for the execution of the lease were executed up to and including an extension to September 25, 1992, granted to CIR by defendant City on July 27, 1992. The extension to September 25, 1992, is contained in a letter from defendant City to CIR, approved as to form by the Corporation Counsel of the City of New York. As a condition of the extension CIR was required to pay to the Economic Development Corporation on behalf of defendant City the sum of twenty thousand ($20,000.00) dollars due by September 25, 1992. Also required by defendant City and approved by the Corporation Counsel in the same letter was the requirement that CIR execute and

deliver a lease to the property consisting of the CIR assemblage and the City owned parkland no later than September 25, 1992.

18. On September 25, 1992, CIR hand delivered to defendant City the executed lease which had been previously prepared and provided by the Corporation Counsel pursuant to the requirements of the resolution of the Board of Estimate and containing the terms set forth in the resolutions of the New York City Board of Estimate and the statute passed by the Legislature of the State of New York on September 1, 1988.

19. At the same time, on September 25, 1992, CIR submitted the $20,000.00 payment to EDC as required by the July 27, 1992, extension agreement.

20. The $20,000.00 check was accepted by EDC. pursuant to the letter.

21. Defendant city never rejected the lease executed and submitted by CIR. However defendant City failed and refused to execute the lease and return a fully executed copy to CIR.

22. On or about March 8, 1994, John S. Dyson, Deputy Mayor of defendant City and an agent of defendant City, by letter (the "Dyson letter). informed CIR that its rights and interest in the properties owned by defendant City that are included in the properties that are the subject of the lease would be terminated on March 18, 1994, due to CIR's failure to obtain financing for the project. Plaintiff informed defendant City that the lease was in effect from the date that CIR had submitted the executed lease to defendant City on September 25, 1992, as required by defendant City, that defendant City was required to submit the lease executed by defendant City to CIR and that defendant City had no right to unilaterally terminate CIR's contract rights under the lease and under the License Agreement which was still in effect. However, defendant City made no response and has at no time ever rejected the lease.

23. To protect its rights, CIR brought a state action pursuant to New York State Civil Practice Law and Rules Article 78 seeking an order requiring withdrawal of the Dyson letter and requiring defendant City to execute and deliver a copy of the ground lease. Plaintiff sought a preliminary injunction seeking extension of the March 18, 1994, deadline set forth in the Dyson letter but the preliminary injunction was denied. However, defendant City and defendant Mayor commenced negotiations with CIR rather than litigate the Article 78 proceeding and treated the Dyson letter as a nullity. To date there has been no decision in that proceeding.

24. After several meetings with representatives of defendant City and agents of defendant Mayor in or about the latter part of 1997, CIR was informed that defendant City would execute the lease executed by CIR in September, 1992. Then in or about 1998 CIR was informed that defendant city would not execute the lease executed by CIR in September 1992, unless a minor league baseball stadium was provided for in the plans for the family theme park to be constructed by CIR on the subject property,

25. In a effort to further satisfy the defendant City and the defendant mayor, CIR provided in the plans for the amusement park an area to be devoted for the minor league baseball stadium as part of the project. However, defendant Mayor was still not satisfied and demanded other changes.

26. The properties controlled by CIR were be transferred to defendant City pursuant to the lease executed by CIR in September, 1992.

27. In or about 1998, defendant City notified plaintiffs that it was selling the tax liens on the properties at issue and did sell those tax liens.

28. However, defendant City rescinded the sale of the tax liens, explaining to plaintiffs president that the sale had been undertaken by mistake, again confirming to plaintiff and upon which plaintiff relied, that the lease executed by

plaintiff was a viable active document.

29. Nevertheless, in or about 1999, the City again sold the tax liens and the purchaser has threatened to commence legal proceedings to enforce those liens, which proceedings are, on information and belief, imminent.

30. In or about 1999, CIR was informed by an officer of the New York City Economic Development Corporation (EDC) that the project was taken from the EDC by defendant Mayor and that such action by defendant mayor was unprecedented concerning development projects in the City of New York. Thus, CIR was intentionally treated differently from others similarly situated; there is no rational basis for the difference in treatment except that the City and defendant Mayor wish to obstruct the development of the amusement and theme park so as to construct a baseball stadium for the New York Mets to use for their minor league team.

31. In June, 1999, plaintiffs learned from newspaper reports that defendant City had assured the Coney Island community board that has jurisdiction over the site where the amusement park is to be constructed that a minor league baseball stadium for the use of the New York Mets minor league team and a project known as "Sportsplex" is to be constructed on the site rather than the amusement park. Photographs and diagrams accompanying the report portray an agent of defendant City giving a presentation to the community board and using a diagram that includes the stadium and the Sportsplex project but not the amusement park.

32. The reports of the actions of defendant City demonstrate that defendants were acting and negotiating in bad faith and that nothing that CIR agrees to would or will induce defendant City and defendant Mayor to submit to CIR the executed lease and comply with the requirements thereof.

33. Plaintiff has expended sums in excess of $12,000,000.00 for the purchase of the real property required

by the lease and for development designs, models, plans, and the very important environmental and traffic studies required by the defendant City and the State and Federal statute

34. In or about March, 2000, defendant Mayor did submit the plans for construction of a minor league baseball stadium on the site of the amusement park to the New York City Council for approval, the purpose of which is to commence construction of the minor league baseball stadium immediately.

35. The proposal in response to the City's Request for Proposals,its acceptance by the City, the execution of the License Agreement, the purchase of the additional parcels with the encouragement of the City, the state legislation, the resolution of the Board of Estimate, the execution of the extension letters, the submission of payments for those extensions, the execution of the lease by CIR, etc., have given to CIR a constitutionally protectable property interest in the City owned parkland and in the lease to that parkland.

36. The actions of defendants have deprived CIR of its property in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

37. At all times referred to herein, defendant City and defendant Mayor and his agents acted under color of law.

First Claim:

38. The allegations set forth at paragraphs "1" through "37" are repeated as though set forth in full herein.

39. The actions of defendants have violated CIR's right to substantive due process of law in violation of the Fourteenth Amendment to the United States Constitution.

40. Due to defendants' violation of the Fourteenth Amendment to the United States Constitution under color of law, CIR has been injured and is entitled to judgment against defendants pursuant to 42 U.S.C. § 1983.

41. CIR has no remedy at law.

Second Claim:

42. The allegations set forth at paragraphs "1" through "37" are repeated as though set forth in full herein.

43. The actions of defendants have violated CIR's right to equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution

44. Due to defendants' violation of CIR's right to equal protection of the laws, CIR has been injured and is entitled to judgment against defendants pursuant to 42 U.S.C. § 1983.

45. CIR has no remedy at law.

Relief Sought

Wherefore, plaintiffs respectfully demand judgment against defendants as follows:

A. A declaration that defendants have violated plaintiff's constitutional rights to due process and equal protection and an injunction directing defendants to cure the violation of such rights and to cease and desist from violating such rights in future;

B. An injunction directing that defendants submit to plaintiffs an executed copy of the lease between defendant City and CIR forthwith,

C. An injunction enjoining any further breaches of or interference with the lease between defendant City and CIR by defendants;

C. An injunction permanently enjoining construction of a minor league baseball stadium, or any other structure by defendant City, or any person or entity on its behalf or from granting permission to any person or entity other than CIR to construct a baseball stadium or any other structure on the site covered by the lease with CIR while the lease is in full force and effect,

D. Punitive damages,

E. Costs and attorneys fees pursuant to 42 U.S.C. § 1988, and

F. Such other and further relief as the court deems just and proper.

Dated: New York, New York April 13, 2000

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